The Central Law Journal.

ST. LOUIS, APRIL 22, 1881.

CURRENT TOPICS.

The ruling of the Supreme Court of the United States in Miles v. United States, a prosecution for bigamy, has brought to notice a defect in the law of evidence, making it impracticable to procure convictions of the Mormon offenders against the law forbidding polygamy, until it is remedied. The indictment in the case charged substantially that the defendant, being already married to one Emily Spencer, did, the said Emily Spencer being still living, and at that time his legal wife, intermarry with Caroline Owens. At the trial, after some evidence had been introduced to show the first marriage, but while it was still in controversy, Caroline Owens was offered as a witness to prove it. Thereupon, the defendant, with an astuteness which does much credit to his counsel, admitted in open court the charge of the indictment that he had been married to Caroline Owens; and objected to her competency as a witness against him on the ground that section 1604 of the compiled laws of Utah declares that, "a husband shall not be a witness for or against his wife, nor a wife a witness for or against her husband." The court overruled the objection, and admitted Caroline Owens' testimony. This ruling was sustained by the Supreme Court of Utah Territory, but was held to be error by the Supreme Court of the United States. Said Mr. Justice WOODS, in delivering the opinion of the court: "The result of the authorities is that, as long as the fact of the first marriage is contested, the second wife can not be admitted to prove it. When the first marriage is duly established by other evidence, to the satisfaction of the court, the second wife may be admitted to prove the second marriage, but not the first, and the jury should have been so instructed." 1 Hale, Pleas of the Crown, 693; 1 East's P. C. 469; 2 M. S. Sum. 331; Ann Cheney's Case, O. B. May, 1730, Sergt. Foster's Manuscript; Peak's Evid. (Norris) 248; 3 Greenl. Evid. The court adverts to the obvious difficulty which will arise under this ruling in every prosecution founded upon the polygamous marriages of the Mormons. Such marriages are celebrated in the "Endowment House" in secret, by persons so pledged to secresy, that it will be practically impossible to extract the facts from them when put upon the witness stand. "But," say the court, and very properly, "this is not a consideration by which we can be influenced. We must administer the law as we find it. The remedy is with Congress, by enacting such a change in the law of evidence in the territory of Utah, as to make both wives witnesses on indictments for bigamy." It is earnestly to be hoped that this suggestion will not be disregarded.

The question of the right to restitution of money which has been collected under an execution, issued upon a judgment, which has been subsequently reversed, is one which is rarely litigated and, therefore, is not of great practical importance. The subject, however, presents some interesting phases which are worthy of notice. The general rule underlying the determination of such causes is, that money, which has been voluntarily paid under a misapprehension of the law, cannot be recovered, unless some other element intervenes to give the party paying, the right of action. The all important question then, upon the solution of which, the determination of many of the cases depends is, what constitutes a "voluntary payment." The case of the Travelers' Insurance Co. v. Heath, recently determined by the Supreme Court of Pennsylvania, is in point. The original suit was by the insurance company against the sureties on an agent's bond. The plaintiff recovered judgment, and the defendants sued out a writ of error. This writ of error was dismissed, the defendants thereby losing the benefit of the writ as a *supersedeas*, and an execution was issued upon the judgment below, and the money collected from the defendant, Heath, the sheriff's return being: "Money made; paid by John Heath." Meanwhile the defendants sued out an alias writ of error, and succeeded in procuring a reversal of the judgment below, upon the ground that the plaintiff company, which was a Connecti-

cut corporation, had failed to comply with the requirements of the law of Pennsylvania, permitting them to do business in that State. At the time of the reversal the defendant, Heath, applied for a writ of restitution, which was refused. Thereupon he brought this action. The company defended upon the ground that the payment mentioned, was a voluntary payment. The court, however, held that as Heath had no alternative but to pay, or to submit to seizure and sale of his property, the payment could not be considered as voluntary. The court further held that the refusal to grant the writ of restitution upon the reversal of the judgment below was not a bar to the plaintiff's action, that restitution is a matter of grace, rather than of right, and that it rests in the exercise of a sound discretion, and that its former refusal under different circumstances could not be considered a bar to the action. Harger v. Commissioners, 2 Jones, 251; Federal Ins. Co. v. Robinson, 1 Norris, 359; Duncan v. Kirkpatrick, 13 S. & R. 292.

THE RIGHT OF EXEMPTION, AS APPLIED TO PARTNERSHIP PROPERTY.

A few days ago, in the case of Love v. Blair,[1] the Supreme Court of Indiana decided that one partner can not claim any part of the property of an existing partnership as exempt from sale upon execution against him. Although there is some conflict on the subject, this seems now to be the opinion of the majority of the courts before whom the question has come.[2] The question is one of such practical importance, that it is a little surprising that it has so seldom arisen for adjudication. It came first before the Supreme Court of New York, in 1867, in the case of Stewart v. Brown.[3] There the view of the court was not based upon any adjudicated cases, nor was any authority cited to sustain it, but the decision allowing the exemption was made to rest wholly on the duty of the court, to assist in carrying out the purpose intended to be accomplished by the exemption laws. The court assume that the only difference between an individual ownership and a partnership interest is in the quantity of the interest, and say: "The language of the act should be construed in harmony with its humane and remedial purpose. Its design was to shield the poor, and not to strip them. The interest it assumes to protect is that belonging to the debtor, be it more or less." The same question came before the Supreme Court of Massachusetts,[4] and was decided at about the time when the case of Stewart v. Brown was decided in New York, and probably before that decision was made known, as neither that nor any other case was cited in the opinion. The conclusion arrived at in Pond v. Kimball was directly the reverse of that in Stewart v. Brown, and was made to depend on the peculiar character of the partnership interest. In their opinion the court say: "Property belonging to the firm can not be said to belong to either partner as his separate property. He has no exclusive interest in it. It belongs as much to his partner as it does to him, and can not, in whole or in part, be appropriated (so long as it remains undivided) to the benefit of his family. It may be wholly contingent and uncertain, whether any of it will belong to him on the winding up of the business and the settlement of his account with the firm."

When the question came afterwards before the Supreme Court of North Carolina,[5] they took a middle ground, of which they are still the sole occupants, and held that a member of a copartnership could take such an exemption if all the partners assented to it. But this decision has not been regarded with much favor, and seems never to have been followed. In the case of Gaylord v. Imhoff,[6] the Supreme Court of Ohio, in commenting on the lack of harmony in the decisions on this question, say: "There is a direct conflict between the New York and the Pennsylvania decisions; one or the other is right, and must be followed. But we think the principles

[1] Decided March 31, 1881, Elliott, J.

[2] Russell v. Lennon, 39 Wis. 570; Gaylord v. Imhoff, 26 Ohio, St. 317; Bonsall v. Comly, 44 Pa. St. 447; Grimes v. Bryne, 2 Minn. 90; Guptil v. McFee, 9 Kas. 30; Wise v. Frey, 7 Nev. 134; State v. Spencer, 64 Mo. 355; *In re* Handlin, 3 Dill. 290; 2 Cent. L. J. 264; 39 Cal. 666; 12 Nev. 20; Pond v. Kimball, 101 Mass. 105.

[3] 37 N. Y. 350.

[4] Pond v. Kimball, 101 Mass. 105.

[5] Burns v. Harris, 67 N. C. 140.

[6] 26 Ohio St. 317.

laid down by the North Carolina decision wholly untenable. The statute confers a positive right that in a proper case can be asserted against all the world, and this is a dignity that inheres in all positive legal rights."

All the decisions, with the exception of the case decided in North Carolina, have arranged themselves either in the line of the New York or the Massachusetts cases. Of the former there are but few;[7] while the great current of authority is now in the line taken by the latter.[8] The difference between the two positions is the fundamental one of the nature of a copartnership, and does not depend upon statutory construction merely. There is, in fact, so much confusion as to the partnership relation, that even among the cases following the lead of Pond v. Kimball, *supra*, there are many inconsistent *dicta*, and propositions are laid down in several of them, which can not be maintained on principle. In the case of Russell v. Lennon,[9] the court say, *obiter*, that "In proper cases, each member of a partnership is entitled to his separate exemption out of the partnership; and the partnership property, after levy, may be severed by the partners, so that each partner may have his exemption." Although in the same case the court say: "The difficulties suggested by the Supreme Court of Massachusetts (in Pond v. Kimball, *supra*), in the way of partnership exemptions seem to be insuperable." And in several cases it has been maintained that a partnership itself is entitled to an exemption.

As has been stated, the New York court assumed in Stewart v. Brown, that the only difference between a joint and partnership interest is in the quantity of the interest. Mr. Freeman apparently takes the same position in his work on Executions; for in section 221 of the work, he says: "A part interest is, in most of the States, as much exempt from execution as though it were an interest in severalty; and this is true, whether it be held in co-partnership or co-tenancy, and whether the execution be for the debt of one owner, or for the debt of all the owners." In support of these propositions, he cites several decisions, of which only two, however, are in point; the case of Stewart v. Brown, *supra*, and Radcliff v. Wood, 25 Barb. 52.

There is, in fact, a broad distinction recognized by the courts, between a cotenancy and a copartnership. In the case of Guptil v. McFee [10], the court decline to express any opinion as to what the law might be in a case "where the debtor's interest in the property is fixed and certain, as a joint interest or an interest in common, or an interest consisting of an aliquot part, and not merely a contingent copartnership interest." And in *In re* Handlin [11], Dillon, J, says: "The case may be different as to mere joint ownership, where no partnership relation existed." Where this distinction is recognized, it seems impossible that the right of a partner to claim as exempt from levy and sale on execution could be admitted. The very definition of a copartnership would seem to prove the impossibility of any member asserting a claim to any part of its assets for his individual benefit. The exemption laws do not attempt to, and cannot grant any exemption to a debtor, other than of a specific amount of property already belonging to him. But a partner has no exclusive right to, or ownership of the copartnership property, or any part of it. In the language of the Supreme Court of the United States in Case v. Beauregard,[12] "The right of each partner extends only to a share of what remains after payment of the debts of the firm and the settlement of its accounts," and this definition is generally accepted as the true one.[13] Accepting it as such, it does indeed suggest difficulties in the way of granting an exemption to the members of a firm, which are insuperable. The statutes granting exemptions, even though construed as liberally as even the Supreme Court of New York in Stewart v. Brown, *supra*, contend for, cannot be so construed as to give an insolvent debtor property which he does not own. By the utmost stretch of liberality, the exemption can only be made to cover "the property of the debtor." The

[7] Radcliff v. Wood, 25 Barb. 52; *In re* Young, 3 Bank. Reg. 440; *In re* Rupp, 4 Id. 95; *In re* McKercher, 8 Id. 409; *In re* Richardson, 1 Cent. L. J. 588; Howard v. Jones, 50 Ala. 67; 13 Am. Law Reg. 457, though this last is hardly in point.

[8] See note (2) *ante*; Phil. Pl. 353; *In re* Blodgett, 10 Bank Reg. 145.

[9] 39 Wis. 570.

[10] 9 Kans. 30, cited in note 2, *ante*.

[11] 3 Dill. 290; 2 Cent. L. J. 264, cited in note 2, *ante*.

[12] 9 Otto, 119; 8 Cent. L. J. 344.

[13] 3 Kent Com., 37, 65 and notes; Story on Part., §311, 312 and notes.

debtor may in fact have a right to a surplus after payment of firm debts, and such an interest he would of course be entitled to hold exempt under the exemption laws of his State as against individual creditors, the same as any other specific property belonging to him; but it cannot be held, untill it has been first reduced so far to his possession, that it may be specifically identified as his.

W. L. STONEX.

LOCAL OPTION — A REJOINDER TO CHARLES R. GRANT.

Inasmuch as Mr. Grant has published in this journal[1] what is termed a "Reply to Henry Wade Rogers," it may not be improper for me to file my "Rejoinder" thereto, and to embody therein the following statement of facts, with which I take final leave of this subject.

1. Mr. Grant's first article was entitled, not the Constitutionality of Local Option in Ohio, as might be inferred from his "reply," but rather the Constitutionality of Local Option Laws. To be sure, Mr. Grant in his article considered the constitutionality of local option in Ohio, but he also considered the constitutionality of local option laws in general, as the title of his article indicated. His conclusion, that local option in Ohio was unconstitutional, was based not merely upon the provision of the Constitution of that State, that no act should be passed "to take effect upon the approval of any other authority than the General Assembly." If it had been, I certainly should not have taken issue with him. And most certainly I should not have done so without, at least, "alluding" to the fact that there was such a thing as a Constitution in Ohio, and that it contained such a provision, and that my explanation of it was so and so. For ignorant of the provision I could not have been, as he had set it forth explicitly in his article.

2. My article, which he seems to have supposed to be on the constitutionality of local option in Ohio, was entitled generally, as his article had been: "The Constitutionality of Local Option Laws," and was upon that subject, and not upon the other. I did not deal at all with that branch of his argument which related to the constitutionality of local option in Ohio; but as he had reviewed the cases and come to the conclusion that "the decided weight of judicial authority" was "overwhelmingly" against local option, not in Ohio merely, but in general, I took leave to respectfully "doubt" the soundness of that conclusion. I dealt with the subject of local option in general, and not in particular as confined to Ohio, and the conclusion reached was expressed as follows: "The conclusion is irresistible, that a local-option law is by no means an unconstitutional measure; that the late decisions must be regarded as having definitely decided the question, that such laws are to be upheld by the courts." In that conclusion I was fortified by decisions from able courts—those of Massachusetts, New Jersey, Maryland, Connecticut, Pennsylvania, Minnesota and Indiana. To these I now add the case of Anderson v. Commonwealth,[2] decided by the Supreme Court of Kentucky, and I will add that it is a "recent" decision, being rendered in 1877, "decided later, by a year, than any cited by him" (Mr. Grant), including his stock-law case cited from Missouri. I was also fortified by the opinion of Mr. Justice Cooley, expressed in his Constitutional Limitations, to the effect that "the clear weight of authority is in support of legislation of this nature, commonly known as local-option laws."

3. In his "reply," Mr. Grant confines his attention to "Local Option in Ohio," and shows that the cases cited by me are not pertinent to that subject. I can only add that I fully agree with him on that point, and that I never have entertained a contrary opinion. I have no doubt that the law urged upon the legislature of Ohio was an unconstitutional measure. I have no less doubt that "the decided weight of judicial authority" is not "overwhelmingly" opposed, but, on the contrary, is "overwhelmingly," or rather, "irresistibly" in favor of legislation known as local-option laws.

HENRY WADE ROGERS.

[1] 12 Cent. L. J. 314.

[2] 13 Bush, 485.

CONTRACTS BY TELEGRAPH.

Since the introduction of the telegraph as a common means of communication between parties in distant places, it has grown into such general favor, and has so revolutionized business, that it has, to a large extent, superseded the mail as a conduit of commercial correspondence. Telegrams are now used in almost every species of business, and contracts innumerable are entered into through their use. As each new invention is discovered, it is necessary for the courts and the legal profession to consider to what extent the existing laws will suffice to develop the new legal relations brought into existence by the use of the invention. Whenever it is possible, the conservatism of jurisprudence prefers the application by analogy of existing rules to the formation new ones. Wherever an analogy can be discovered between the old and the new facts, the courts will apply the old rules of law to the new order of things. This may, however, be carried too far, and injustice done through the unwillingness to establish new rules specially adapted to the circumstances arising out of the invention.

The telegraph has been in general use for about thirty or forty years, and during that time the telegraphic law has been gradually forming; and, although many important and intricate questions arising from the conduct of the telegraph have been decisively adjudicated, there are still others, which either have never been passed upon at all, or are left in doubt and uncertainty. Such is the case with the questions which form the subject of this article. The telegraph has become so necessary for commercial purposes, so many contracts are being perfected daily by means of telegrams, that it is an interesting question, how far and in what way has the law of contracts been affected by the introduction of the telegraph as a means of communication.

The questions to be discussed may be divided into three general subjects:

1. The sender of telegram bound by the terms of the message as delivered to the receiver.

2. Contracts by telegraph in relation to the statute of frauds and the rules of evidence concerning written and parol contracts.

3. At what point of the correspondence by telegraph the contract is consummated.

I. The first question more clearly stated is, how far is the telegraph company the agent of the sender, so as to make the latter responsible for the errors made in transmission, and bind him to the terms of the telegram as received? The telegram is first written by the sender and left with the company for transmission. The message is then conveyed along the wires by the electrical current, and the agent at the other end writes it down. The last writing is then sent to the person to whom it is addressed. The receiver never sees the original telegram. He sees only the copy written by the operator at his end of the wire. Through the many unavoidable defects and accidents in the telegraphic system, errors in th message are very easily made in the transmission. In the event of an error, the receiver is misled, and has no means of discovering the mistake. The question then arises, which is the proper and correct evidence of the intentions of the sender, so far as the receiver is concerned, the telegram sent or the telegram received?

If the telegraph company becomes the agent of the sender for the purposes of the message, then under the legal maxim, *qui facit per alium, facit per se*, he is responsible for all the errors of the company, and is bound by the terms of the message as received. If an offer or commercial proposition is conveyed by the telegram, it would seem that the message delivered, would constitute and qualify the offer; and if there has been any mistake made in the terms, by the company in its transmission, it is the act of an agent, and, consequently, imputable to the principal. If a verbal message was delivered to an agent, and through his mistake the message as received was different from the one delivered, there would be no question as to the liability of the principal for the errors of his messenger. There is a likelihood of mistakes in both cases, and it would seem that the analogy was complete. Such has been the opinion of the American courts in the few cases in which the question has arisen. Durkee v. Vermont Central Railway, 29 Vt. 127; Dunning v. Roberts, 35 Barb. 463; Trevor v. Wood, 36 N. Y. 307; Loveland v. Green, 40 Wis. 431. In the last case it was held that the party who sends an order by telegraph, makes the telegraph company his agent for its transmission and delivery, and is bound by the message as delivered; and where legal rights of the receiver founded upon such order are in question, he is entitled to put in evidence the message actually received as the original.

The English courts have, however, decided that such is not the case. Thus in Henkel v. Pape, L. R. 6 Ex. 7, where, after some negotiations for the purchase of fifty rifles, the defendant telegraphed for "*three* rifles," by some mistake in the transmission, the message received by plaintiff read, "*the* rifles." Thinking that the defendant referred to the previous negotiations for the purchase of fifty rifles, the plaintiff sent him fifty rifles. Upon the refusal of the defendant to accept them, the plaintiff brought suit for the breach of the contract. The court held that he could only recover the three called for by the original telegram. If this be the law in England, then the receiver is without a remedy for the injury suffered from the mistake. For it has also been held that only the sender of the message has any cause of action against the telegraph company; and that the receiver has no right of action, because of the want of privity to the contract. Playford v. United Kingdom Tel. Co., L. R. 4 Q. B. 706. This case is also in direct conflict with the American authorities, which almost uniformly hold that the receiver or any one else who is injured by the mistakes of

the telegraph company, can sue in tort, and recover proper damages of the telegraph company. Bowen v. Lake Erie Tel. Co., Allen's Tel. Cas. 7; Aiken v. Western Union Tel. Co., 5 S. C. 358; Lowery v. Western Union Tel. Co., 60 N. Y. 198; Elwood v. Western Union Tel. Co., 45 N. Y. 549; Rose v. U. S. Tel. Co. 3. Abb. Pr. (N. S.) 408; N. Y. and Wash. Printing Tel. Co. v. Dryburg. 35 Pa. St. 157; De Rulte v. New York &c. Tel. Co., 1 Daly 547; Ellis v. American Tel. Co., 13 Allen, 226. It is possible that the English courts are urged to these decisions by the fact that the telegraph in that country is a governmental institution, instead of being conducted by private corporations, as in this country. It is difficult however to see, in what way the public or governmental character of the telegraph can affect the law of private contracts arising through its use. The American decisions are certainly more consonant with the general principles of the law of agency. Fenn v. Harrison, 3 T. R. 757; s. c., 4 Id. 177; Whitehead v. Tuckett, 15 East, 408; Pickering v. Busk, 15 East, 38,43; Daniel v. Adams, Ambler, 495,498; Johnson v. Jones, 4 Barb. 369; Story on Agency, § 131.

II. Statute of frauds and rules of evidence. It will be remembered that the statute of frauds requires in certain kinds of contracts, that the party to be bound should obligate himself in writing subscribed by him. It will not be necessary to discuss at length the requirements of the statute as to writing and signing. It is evident that no difficulty will arise where the telegram is signed by the party to be charged, and it contains a statement of all the facts necessary to show a complete contract. Trevor v. Wood, 36 N. Y. 307; Loveland v. Green, 40 Wis 431, The difficulty is experienced only, when either there is no writing signed by the sender personally, or the telegram gives only a partial statement of the facts entering into and forming part of the contract. If the telegram has been written and signed in the first instance by the sender, it has been held that the original writing is the proper evidence of the contract, and not the telegram as received. Kinghorn v. Montreal Tel. Co., 18 U. C. (Q. B.) 60; Durkee v. Vermont Central Railway 29 Vt. 127. But where the sender delivers the message verbally to the operator, is the writing by the receiving operator at the other end of the wire a sufficient compliance with the requirements of the statute of frauds, as to subscription by the party to be charged, to make the contract valid and binding? It has been so held. In Howley v. Whipple 48 N. H. 487, the court says: "When a contract is made by telegraph, which must be in writing by the statute of frauds, if the parties authorize their agents either in writing or by parol to make a proposition on one side, and the other party accepts it through the telegraph, that constitutes a writing under the statute of frauds, because each party authorizes his agents, the company or the company's operator to write for him; and it makes no difference whether that operator writes the offer or acceptance in the presence of his principal or by his express direction, with a steel pen an inch long attached to an ordinary penholder, or whether his pen be a copper wire a thousand miles long." Likewise, in Dunning v. Roberts, 35 Barb. 463, where it was shown that the defendant was in the office when the telegram was sent, and agreed to the message as forwarded, the court say: "It is urged that the telegram was not subscribed by the defendant, nor by his authority. But it has been determined that, under the circumstances of this case, the act of the operator in forwarding the telegram was the act of the defendant. In law therefore, the manipulations of the operator, by which the defendant's name became appended to the dispatch, were his own, and were equivalent to an actual personal signing of his name with pen and ink." These two decisions can, however, only be sustained on the theory that the telegraph company becomes the agent of the sender for the purpose of transmitting and delivering the message, and that the contract between the sender and the telegraph company is an authorization to the latter to sign the name of the former to the copy telegram to be delivered to the receiver. Under the English cases referred to above, it is to be presumed that the decision of the English court on this point would be different.

It is also difficult at times to determine, whether the telegram is a sufficient writing in point of facts stated, to satisfy the requirements of the statute of frauds. For the purpose of avoiding expense the telegram is generally written as concisely as possible, and every superfluous word is omitted. If the necessary elements of a contract are contained in the telegram or telegrams, then the statute of frauds is satisfied, even though the terms, as they appear in the telegram, are ambiguous, and require the aid of parol evidence to explain them. But where the telegram fails to state all the facts necessary to constitute a contract, then it is impossible to complete the contract by the introduction of parol evidence. It very often happens, too, that the telegram is not "designed to be the repository and evidence of their final intentions," but only refers to a prior agreement, and conveys either an assent to, or proposed modification of the same. In such a case, it is clear that the telegram can not be considered a sufficient writing to bind parties, if the original agreement is not in writing. Thus in McElroy v. Buck, 35 Mich. 435, defendants in error were allowed to recover damages from McElroy for refusal to keep his contract to receive and pay for a quantity of hogs, which he had agreed to buy of Buck. The agreement to buy was verbal, and nothing was ever paid or delivered by either party. McElroy was permitted to go to Ohio, before being bound, and should he decide to take the hogs on the terms specified, he was to telegraph Buck & Williams to that effect. McElroy telegraphed from Ohio that he would take "double-deck car of hogs." The hogs were duly provided

and held ready for delivery, but McElroy refused to comply with his contract. The court below held the telegram a sufficient memorandum of the contract under the statute of frauds. The Supreme Court held this ruling wrong, and reversed the judgment of the circuit court. Said Judge Graves, delivering the opinion of the court: "Standing by itself, the telegram contained none of the elements of a bargain, except quantity, and it implied that there had been some communication previously in regard to terms, which would have to be appealed to, to explain the substance of the bargain. Moreover, it did not purport to be a note or memorandum of an agreement at all, but only a simple adhesion to an agreement which had been provisionally arranged theretofore, and the terms of which were assumed to be understood. And the facts show that the previous arrangement so referred to, was one which rested wholly in parol."

In consequence of the general desire to make a telegraphic dispatch as short as possbile, as is above stated, the telegram very seldom contains all the elements of the contract; and even though the requirements of the statute of frauds do not affect the validity of the contract on that account, the question may arise, whether the elements, not stated in the telegram, can be proved by parol evidence, and thus contradict or control the terms of the telegram. Such was one of the questions adjudicated in the case of Beach v. Raritan, etc. R. Co., 37 N. Y. 457. There had been negotiations between the parties for the hire of a barge, and the verbal agreement was to the effect that the barge, if hired, should be used only for special purposes. The plaintiff was to telegraph the defendants, if he decided to rent the barge on the terms agreed upon. The plaintiff telegraphed as follows: "You may have barge, Globe, for $400, until Oct. 1. Rent payable, 1-2 1st July, 1-2 1st Oct." The defendants violated the agreement as to the uses to which the barge was to be put, and the barge was sunk. The action was brought for the recovery of the value of the barge; and the agreement as to the use of the barge was attempted to be proved by parol evidence. Objection was made, but overruled, and the case was taken upon appeal on this and other grounds. The Court of Appeals held that parol evidence was admissible to prove the terms of the contract as to the restricted use of the barge, since the telegram was not intended to be the sole and conclusive evidence of the entire contract. The court say: "When, and to what extent, dispatches sent by parties to each other by telegraph are to be treated as written contracts, or written evidence of their contracts, must depend upon the circumstances in which they are sent, and the intent and object for which they are transmitted and received. Treating them most favorably to the view urged by the appellant, they can have no higher or more conclusive effect than a letter sent by mail in the same terms would have. The first question, then, is, was this telegram, according to the intent and understanding of the parties at the time when it was sent and received, the expression of the contract of the plaintiffs? This question is always an open one in regard to communications between parties, whether oral or written. If there is doubt upon that question, it may properly be left to the jury, and it was left to them in the present case."

"For the determination of that question it is competent to show the circumstances under which, and the purposes for which it was sent, though it may not be competent to show by parol that, in regard to its unambiguous provisions, the parties did not intend to contract according to its tenor. And it is certainly competent to show that it was sent for the mere purpose of fixing one of the details of a proposed agreement, upon which the minds of the parties had not before concurred."

After drawing an analogy between a negotiation by several letters and replies, and an oral application and reply by letter or telegram, the court proceeded: "It would be a strange inconsistency if, where an entire negotiation is conducted by letter, the proposition of the one party may be read to determine the meaning of the acceptance by the other; but if such proposition be oral, and a written reply for convenience be asked, the reply must be taken to bind the writer, without any reference to the proposition, or any aid therefrom, in particulars where the reply is silent, or, in other words, if the reply closed the doors to inquiry, provided, if construed alone, it would be capable of receiving a legal signification. * * * * The distinct ground upon which I place my opinion is that, where a proposition on one side is submitted, whether verbal or written, calling for an answer based on such proposal, the answer, though in writing, need not necessarily recite all the terms and conditions embodied in the proposal. It is to be read in connection with the proposal to which it is a reply, and the whole together constitutes the contract between the parties. Such written (or telegraphic) reply is, no doubt, conclusive so far as the terms are expressed, but no further. In such case the reply is neither made nor received as, nor understood to be the expression of the whole contract.

III. The next question to be considered is, at what point the contract by telegraph is consummated. To constitute a complete and perfect contract, there must be an *aggregatio mentium*, an offer and acceptance coming together and agreeing in every particular. When that point is reached, where there is a distinct proposition on one side, and a full and complete acceptance on the other, then the contract is consummated. This is the general rule of law, and in its application to contracts by mail, it has been held that the contract is consummated, when the letter containing the acceptance is posted, provided the acceptance is mailed within a reasonable time after the offer was received; and it is further held, that the contract is binding, even though the letter of acceptance is

lost in the mail, and never received by the other party. Chiles v. Nelson, 7 Dana, 281; Mactier v. Frith, 6 Wend. 103; Tayloe v. Insurance Co., 9 How. 390; Vassar v. Camp, 11 N. Y. 441; s. c. 14 Barb. 341; Abbott v. Shepard, 48 N. H. 14; Stockham v. Stockham, 32 Md. 196; Bryant v. Booze, 55 Ga. 438; Levy v. Cohen, 4 Ga. 1; Wheat v. Cross, 31 Md. 103; Hamilton v. Insurance Co., 5 Pa. St. 339; Dunlop v. Higgins, 1 H. L. Cas. 381; Adams v. Lindsell, 1 B. & Ald. 681. The tendency of the decisions is to apply the same rule to contracts by telegraph. Minn. Oil Co. v. Collier Lead Co., 4 Dill. 431; Trevor v. Wood, 36 N. Y. 306; Durkee v. Central Railway, 29 Vt. 127. There have been, however, *obiter dicta* from the bench to the effect that a distinction should be made between contracts by mail and those by telegraph. Willes, J., in Godwin v. Francis, L. R. 5 C. P. 295. And Mr. Parsons inclines to the same opinion. In 2 Parsons on Contracts, 257 r, he says: "The reasons for not holding it (the analogy between contracts by mail and by telegraph), may be easily stated. They, in fact, resolve themselves into two. One is, that the mail is a governmental institution. It is the agent of all the people, and of every one of them, and may be considered as, if not guaranteed to a certain extent by the government, still guarded, as well as regulated by the power of the government. It is not so with the telegraph. Efforts are now making to place telegraphing in the hands of the government, and put it on the same footing as the post-office. It may become so, but it is not so yet. State statutes do not require nor institute a telegraph, nor hold it as public property; they only permit it, and confer upon it certain rights, and lay upon it certain duties. Another reason is, that when a letter is delivered, it is perfectly certain that the assent of the accepting party in precisely his own words is, so far as the writer can do it, made known to the offerer. This can never be certain where the message is sent by telegraph. The operator or copyist at either end may make a mistake. Accuracy may be made extremely probable by returning the message; but never certain while it is possible that the mistake in sending is corrected, perhaps, by another mistake in returning the message. We are of opinion, therefore, that at present the contract is not complete, until the message of acceptance is received, or, at least, that the law is not settled otherwise. And so far as the State statutes touch this question, they would seem to require delivery to the receiver, or to make the delivery to the operator alone insufficient."

It is difficult to see how the first objection interposed by Mr. Parsons can raise any serious obstacle to the application of the rule to contracts by telegraph. This is a question relating to private contracts between private individuals. The rule is not confined to contracts by mail, but is applied to all contracts, which are consummated through the medium of some messenger or agent. In Mactier v. Frith, 6 Wend. 103, Justice Marcy says: "What shall constitute an acceptance will depend in a great measure upon circumstances. The mere determination of the mind, unacted on, can never be an acceptance. Where the offer is by letter, the usual mode of acceptance is by the sending of a letter, announcing a consent to accept; where it is made by a messenger, a determination to accept returned through him, or sent by another, would seem to be all the law requires, if the contract may be consummated without writing." And the letter referred to in this case was not sent by governmental mail, but by private post. This doctrine in regard to letters by mail is based upon the theory that the post becomes the agent of the offerer; and when he sends his offer by mail, it is is an implied authorization to the acceptor to send his acceptance through the same medium. The post being considered the agent of the offerer, the letter of acceptance is held to be delivered, and the contract consummated, when the letter is dropped in the mail.

The second objection is strong and well-taken. There are so many unavoidable inaccuracies in the telegraphic system, that it would be extremely hard upon parties, if the law concerning contracts by mail is applied in all its details to contracts by telegraph. It is very just and proper that the delivery of the telegram to the operator should so far consummate the contract as to prevent any revocation by the offerer or acceptor of their respective portions of the contract. But the authorities on contracts by mail go further, and hold that delivery of the letter to the post constitutes a binding contract as to both parties, even though the letter of acceptance is never received by the offerer. This seems to be the logical deduction from the principles of law applicable to the case, but it is calculated to work a hardship in many instances, where there is no fault in the party suffering from it. But it is the almost unanimous conclusion of the cases, and it would be useless to attempt to change the current of judicial opinion, so far at least as it concerns contracts by mail. And the rule has been applied in its full force to contracts by telegraph. Minnesota Oil Co. v. Collier Lead Co., 4 Dill. 431; Durkee v. Vermont Central Railway, 29 Vt. 127; Trevor v. Wood, 36 N. Y. 307. In the last case the defendants, residing in New Orleans, submitted by telegraph an offer to sell Mexican dollars to the plaintiffs, residing in New York, and the plaintiffs accepted the offer by telegraph. The latter telegram failed to reach the defendants on account of the destruction of a portion of the lines of the telegraph company. The defendants not hearing from the plaintiffs for several days after their telegram was sent, concluded that the plaintiffs did not want the Mexican dollars, and sold them to other parties. Later on, the plaintiffs demanded the fulfillment of the contract, and, the defendants refusing, because of their inability at that time to procure the desired quantity of

Mexican dollars, plaintiffs brought this suit for the recovery of damages for the breach. The parties to this case had previously agreed that their communications should be by telegraph, so that it was not necessary to imply an authority from the offerer to send the reply by telegraph. This does not, however, affect the case to any essential degree. The court held that the contract was consummated, when the plaintiffs delivered the telegram to the operator at New York, and the risks attending its transmission were assumed by defendants, and therefore the contract was binding upon them, even though they never received the telegram.

The case of British and American Tel. Co. v. Colson, L. R. 6 Exch. 108, is opposed to this doctrine, and holds that the telegram containing the acceptance must eventually be received by the offerer to make the contract valid and binding upon him. This case has, however, been severely criticised by the English courts in succeeding cases, and has in a late case been expressly overruled. Household Fire Ins. Co. v. Grant, on appeal in the English High Court of Justice, and reported in 19 Am. Law Reg. (N. S.) 180. The contracts by mail and those by telegram are held to be identical so far as this question is concerned, and the older authorities, holding that the contract is consummated for all purposes upon the mailing of the letter, or delivery of the telegram to the operator, are expressly confirmed.

Notwithstanding the almost unbroken array of authorities to the contrary, it can not but seem as if the doctrine laid down in the dissenting opinion of Judge Bramwell in the last mentioned case, is more consonant with a practical sense of justice, although the opposing and prevailing view may be more consistent with, and a more logical deduction from, the ordinary rules of the law of contracts. This was the case of a letter containing the acceptance of an offer, which failed to reach the party to whom it was addressed. The court held that the contract was perfect as soon as the letter was put in the post, and both parties were bound, though the letter was afterwards lost in the mail. Judge Bramwell, in dissenting from the opinion of the court, laid down the following propositions: "First, where a proposition to enter into a contract is made and accepted, it is necessary, as a rule, to constitute the contract, that there should be a communication of that acceptance to the proposer. Per Bryan, C. J., Year Book, 17 Ed., IV., fo. 1 and 2, plac. 2, cited in Blackburn on Sales, p. 189. Secondly, that the present case is one of proposal and acceptance. Thirdly, that as a consequence of, or involved in the first proposition, if the acceptance is written or verbal—*i. e.*, by letter or message—as a rule it must reach the proposer, or there is no communication, and so no acceptance of the offer. Fourthly, that if there is a difference where the acceptance is by a letter sent through the post, which does not reach the offerer, it must be by virtue of some general rule or some particular agreement of the parties. As, for instance, there might be an agreement that the acceptance of the proposal may be by sending the article offered by the proposer to be bought, or hanging out a flag or sign, to be seen by the offerer as he goes by, or leaving a letter at a certain place, or any other agreed mode; and in the same way there might be an agreement that dropping a letter in a post pillar-box or other place of reception should suffice. Fifthly, that as there is no such special agreement in this case, the defendant, if bound, must be bound by some general rule which makes a difference where the post-office is employed as the means of communication. Sixthly, that if there is any such general rule applicable to the communication of the acceptance of offers, it is equally applicable to all communications that may be made by post; because, as I have said, the question is not whether this communication may be made by post. If, therefore, posting a letter which does not reach, is a sufficient communication of the acceptance of an offer, it is equally a communication of everything else which may be communicated by post, *e. g.*, a notice to quit. It is impossible to hold that, if I offer my landlord to sell him some hay, and he writes, accepting my offer, and in the same letter gives me notice to quit, and posts his letter, which, however, does not reach me, he has communicated to me his acceptance of my offer, but not his notice to quit." This question, however, so far at least as contracts by mail are concerned, must be considered as definitely settled in opposition to the views of Judge Bramwell, and if the analogy between such contracts and contracts by telegraph is to be sustained throughout, the same rule must be applied to contracts by telegram, in conformity with the decision of the New York Court of Appeals in Trevor v. Wood, *supra*.

A kindred question, likely to arise in the construction of contracts by telegraph, is, whether the same rule would apply, where the offer is by mail and the acceptance by telegraph. Since the contract is held to be consummated at the time that the letter or telegram of acceptance is mailed or dispatched in the above cases, on the ground that the postal service or telegraph company is, by implied authorization, the agent of the offerer for the purposes of receiving the reply, as well as sending the telegram of proposal; a similar authority, expressed or implied, must be made out, to apply the same rules to cases where the offer is by letter and the acceptance by telegram. If the telegram conveying the acceptance reaches the offerer in due time, the contract is complete, at least from the time that the telegram is received. But if the telegram failed to reach the offerer, it would seem impossible to hold the contract perfected, unless an authority, express or implied, to accept by telegram was established. There does not appear to be any adjudication on this point, but this would most probably be the conclusion of the courts.

The indiscriminate use of the mail and telegraph

for commercial communications raises also the question, whether one can by telegraph revoke an acceptance sent by mail. It has been held that a withdrawal of an acceptance, reaching the offerer before or at the time that the letter of acceptance is received, will render nugatory such acceptance, and such a contract will be binding upon neither party. Dunmore v. Alexander, 9 Shaw & Dun. 190; Benjamin on Sales, § 74. If these authorities are substantiated and supported in this country in relation to contracts entered into entirely by mail, then no reason can be assigned why a person, after mailing a letter of acceptance, may not avail himself of the telegraph to retract his acceptance. But it would seem that if the letter of acceptance from the time of mailing binds the offerer to his proposal, and prevents any retraction by him, it should also be obligatory to the same degree on the acceptor; for there can be no contract where there is no mutuality in the obligation. The cases cited above hold that the contract is not binding upon the acceptor until the acceptance is communicated to the offerer, and voidable by the acceptor, provided his retraction is communicated before or together with his acceptance. This does not seem to be consistent with the other conclusions of law bearing upon this subject. Judge Marcy, in Mactier v. Frith, 6 Wend.118, says: "If a bargain can be completed between absent parties, it must be when one of them can not know the fact, whether it be or be not completed. It can not begin to be obligatory on the one, before it is on the other; there must be a precise time when the obligation attaches to both, and this time must happen when one of the parties can not know that the obligation has attached to him; the obligation, therefore, does not arise from a knowledge of the present concurrence of the wills of the contracting parties. All the authorities state a contract or an agreement (which is the same thing) to be *aggregatio mentium*. Why should not this meeting of the minds, which makes the contract, also indicate the moment when it becomes obligatory? * * * * If more than a concurrence of minds upon a distinct proposition is required to make an obligatory contract, the definition of what constitutes a contract is not correct." If this reasoning is sound when the obligation of the offerer is disputed, the rule should be the same in regard to the obligation of the acceptor.

There are numerous other questions, which are likely to arise in the construction of contracts by telegraph, but it is impossible to discuss them within the prescribed limits of an article.

C. G. TIEDEMAN.

LIABILITY OF BANK AS COLLECTING AGENT—BAILMENT.

MILWAUKEE NATIONAL BANK v. CITY BANK.

Supreme Court of the United States, October Term, 1880.

Where a bank acts as the collecting agent of certain sight and time-drafts, having control of the grain against which they are drawn, and being instructed to deliver it to the consignees upon payment of the drafts, and otherwise to hold it for instructions, delivers the grain to the consignees, upon the payment of the sight-drafts, but before the payment of the time-drafts, and the consignees became insolvent before the maturity of the time-drafts: *Held*, that the delivery, under such circumstances, is sufficient evidence of a want of due diligence on the part of the defendant as a collecting agent, to take the case to the jury, and that an instruction to find for the defendant was erroneous.

In error to the Circuit Court of the United States for the Northern District of New York.

Mr. Justice MILLER delivered the opinion of the court:

A. F. Smith & Co. were the owners of the Corn Exchange Elevator of Oswego, New York, in which they were engaged in the general business of elevating and storing grain for the public. In September, 1869, Mower, Church & Bell, who were commission merchants in Milwaukee, received orders from Smith & Co. to purchase for them two cargoes of wheat, and to draw on them for the purchase-money against each cargo. The cargoes were bought, and sight-drafts for part of the purchase-money, and time-drafts for the other part were, in each instance, drawn on A. F. Smith & Co. These drafts were purchased by the Milwaukee Bank, the plaintiff in error, which received also the bills of lading for the wheat. These bills describe Mower, Church & Bell as the shippers, and, by their terms, the cargo, in each case, is to be delivered at Oswego to the account or order of T. L. Baker, cashier of the Milwaukee Bank, care of the City Bank of Oswego. The Milwaukee bank enclosed the drafts and the accompanying bills of lading to the City Bank of Oswego, with instructions about insurance, and added, "on payment of the drafts you will deliver the cargo to the order of Messrs. Smith & Co. If not paid, please hold and advise by telegraph. Messrs. Smith & Co. will pay all expenses." The letter and inclosures were duly received and acknowledged by the City Bank, and on presentation to A. F. Smith & Co. they paid the sight-drafts and accepted the time-drafts. When the vessels arrived at Oswego, the masters promptly reported to Mannering, the cashier of the City Bank, who made the following indorsement on each bill of lading held by the masters: "Deliver to the Corn Exchange Elevator, for account of T. L. Baker, cashier, Milwaukee, subject to order of City Bank, Oswego. D. Mannering, Cashier.

Oct. 9, 1869." A. F. Smith & Co. sold and shipped off the wheat after it had been put in their elevator, and failed before the time-drafts fell due, which were duly protested for non-payment, and have never been paid. The Milwaukee Bank sued the City Bank to recover their loss on the drafts, on the ground that the City Bank had delivered the wheat to Smith & Co. before the drafts were paid, contrary to the instructions which accompanied the drafts and the bills of lading. The case was tried before a jury, and all the evidence is embodied in the bill of exceptions, and on the case, as there made, the court instructed the jury to find a verdict for defendant, which was done. It is this instruction which is assigned for error.

The City Bank, in receiving the drafts and bills of lading in letters which instructed it to deliver the wheat to A. F. Smith & Co., on payment of the drafts, and acknowledging the receipt of these drafts, became the agent of the Milwaukee Bank in the business which it had undertaken. Whatever obligation might, under other circumstances, be imposed on the bank by its consent to receive the drafts and bills of lading, it, in the present case, received them with instructions which the bills of lading empowered it to execute, namely, to control the possession of the wheat until the drafts on Smith & Co. were paid. In acknowledging the receipt of these papers the cashier says: "We prefer, after this, not to receive B L (meaning bill of lading) when we have to look after the property." This is an implied admission that they were to look after the property, and would do so in the case to which the letters related. The bank also undertook to discharge this duty when the masters of the vessels, presenting themselves and cargo to the cashier of the bank for delivery, were directed by him in writing to the Corn Exchange Elevator. It, therefore, undertook to discharge a duty as agent of the Milwaukee Bank in regard to the custody of the wheat, under instructions that it should deliver it to Smith & Co. on payment of the drafts. There is evidence tending to show that the Oswego Bank, in its account with the Milwaukee Bank, made an additional charge or percentage for their trouble beyond the customary charge for collecting and remitting proceeds of the drafts. So that it undertook a duty for which it received and intended to exact compensation. What, then, is the measure of its obligation as such agent to the plaintiff bank? We suppose that there can be no question that it should use due care and diligence in performing the task which it had set itself to do. One of the clear duties of an agent under such circumstances, is to obey instructions, if they can be obeyed by a reasonable exercise of diligence and care. We think the instructions in this case clearly implied that the bank, which by bill of lading was invested with the full right to the possession of the wheat, should not deliver it to A. F. Smith & Co., except upon payment of the drafts—that is, of all the drafts drawn against each cargo of wheat. The reasons for this are very plain. The wheat had been bought by Mower, Church & Bell in Milwaukee for A. F. Smith & Co., but they had to raise the money to pay for it by drafts on the latter. These drafts could only be negotiated by placing the control of the wheat in the hands of the purchasers of the drafts as security for their payment. The sight-drafts were paid by Smith & Co. when the wheat arrived in Oswego. They had thus paid that much money on the purchase. There remained unpaid, however, the time-drafts, and the instruction of the Milwaukee Bank to its agent, the City Bank, was not to part with the possession and control of this wheat to Smith & Co. until those drafts were paid. It was the only security the bank had for their payment, and it was ample.

As we have already said, A. F. Smith & Co., were the owners and managers of the Corn Exchange Elevator. It is proved that the officers of the bank knew this. The cashier of the City Bank, therefore, knew that when he made the order on the bills of lading for the delivery of the wheat to the Corn Exchange Elevator, he was ordering its delivery to A. F. Smith & Co. It was by reason of this delivery and the failure of Smith & Co., that the amount of the drafts was lost to plaintiff. Did the defendant bank, therefore, under the circumstances of the case, exercise due care and diligence in storing this wheat in the Corn Exchange Elevator? The judge took this question from the jury and decided it in favor of defendant. We are of opinion that in this the court erred. We do not decide here that the defendant bank was negligent. We think there was evidence on which that question should have been left to the jury. We think it should still be left to a jury. It was said, in answer to this view of the subject, that the bank had no warehouse or other place of its own in which to store the wheat, and that this was known to the Milwaukee Bank, which must, therefore, have known that the City Bank would be compelled to store it with some one until the drafts, which had some time to run, should be paid. That Smith & Co. were supposed to be safe and solvent men engaged in that business, of good reputation, and that all wheat received under such circumstances in Oswego, was deposited in elevators. These are circumstances for the jury to consider. On the other hand, it is to be said that there were other elevators in Oswego, not owned by Smith & Co., ready to receive the wheat. To some of these it could have been delivered without danger of complicating the possession as bailee, with possession under claim of ownership. And this is important, for there are laws making the embezzlement of property, when held as bailee by warehousemen and elevators, a criminal offense. It would be more difficult to convict Smith & Co. of embezzlement for selling this wheat when it had been bought for them, part of the money paid for it by them, and when they had accepted negotiable drafts for the remainder of the purchase-

money, and when, in fact, it was their property, subject only to the payment of their outstanding drafts. Was it acting with ordinary prudence to hazard the security which possession of the wheat gave, by delivering it to the very party to whom his principal had directed him not to deliver it? It further appears that the defendant bank took no receipt from Smith & Co., showing that they held it as bailees, but left that to stand on the indorsement they made on the bills of lading in the hands of the masters of the vessels, and a simple acknowledgment of the receipt of the wheat by A. F. Smith & Co., on the same bills of lading. One of the firm of Smith & Co., swears that no warehouse receipt was given. There was a plain course to be pursued, which involved no difficulty or trouble, namely, storing the wheat in some other elevator or warehouse until A. F. Smith & Co., on payment of the acceptances, should call for it. This course would not have involved a departure from their instruction not to deliver to Smith & Co. until the drafts were paid, and would have saved all parties from loss. Some question is made in the argument as to the effect of proceedings taken by the plaintiff to recover the wheat or its value of the parties who bought or received it from A. F. Smith & Co. It is only necessary to say, if the jury shall be of the opinion that the defendant was negligent in delivering the wheat to A. F. Smith & Co., it is responsible to plaintiff for the amount of the unpaid drafts, less any sum not actually recovered from others.

Without further comment, we are of opinion that there was evidence of negligence or want of due care on the part of defendant, which, taken in connection with the positive instruction of the plaintiff, should have been submitted to the jury. The judgment of the circuit court is, therefore, reversed, with instructions to grant a new trial.

REMOVAL OF CAUSES—AMOUNT IN CONTROVERSY—COUNTERCLAIM.

FALLS WIRE MANF. CO. v. BRODERICK.

Circuit Court of the United States, for the Eastern District of Missouri, March, 1881.

Under the Act of Congress of March 3, 1875, granting the right of removal from the State courts in certain causes, where the amount involved is more than $500, the question of what is the amount involved is to be determined from the plaintiff's demand, and not from a counterclaim filed by defendant prior to application for removal.

On motion to remand.

Louis R. Tatum, for the plaintiff; *Noble & Orrick*, for the defendant.

TREAT, J., delivered the opinion of the court: The plaintiff, an Ohio corporation, brought suit in the State circuit court for less than three hundred dollars, the defendants being citizens of Missouri. The defendants appeared (Feb. 8) and filed an answer and counterclaim. The counterclaim is based on an alleged contract in writing, for the non-performance of which the defendants have sustained damages (unliquidated) in the sum of $1,000. No written contract was filed, or *profert* thereof made. On the following day, the defendants filed a petition for the removal of the cause to this court. Under the Act of March 3, 1875, the defendants, though citizens of Missouri, had a right to the removal, the plaintiff being a citizen of another State; *provided* the amount in dispute exceeds $500. The plaintiff claims less than $500, but the defendants, by way of counterclaim, demand $1,000. The Missouri statute requires that the written contract on which such counterclaim is based should be filed, and under the more recent decisions of the Supreme Court of Missouri, if not filed, a motion to dismiss, etc., would lie. But the defendants having filed their answer and counterclaim on February 8, but not the written contract, appeared next day, February 9, with petition, etc., for removal to this court, an order for which was duly granted. The act of 1875 provides for the removal of a civil suit "where the matter in dispute exceeds, exclusive of costs, the sum or value of $500" * * * * "in which there shall be a controversy between citizens of different States." Hence the parties are within its terms as to citizenship. Are they as to the amount in dispute? Judge Blatchford has recently held (Clarkson v. Manson), in a case similar to this, that, although the plaintiff's demand was for less than $500, yet as the defendant's counterclaim for judgment over, was for more than $500, the cause was removable. If that be a true interpretation of the act, the door for removals is wide open, whenever a defendant, for purposes of delay, or otherwise, chooses to interpose a counterclaim for more than the prescribed sum; thus drawing into United States courts the trial, through the device of a counterclaim, of any cause in which the amount claimed by plaintiff, although less than $500, is to be determined. It may be, on the other hand, that the original demand in the State court is for a small sum, while the real dispute involves thousands of dollars. How shall a United States court avoid fraud on its jurisdiction on one hand, and preserve the just right of removal on the other? Must it await the final outcome, and then render judgment as the facts may require, pursuant to the terms of section 5 of the act of 1875, by remanding or dismissing?

An important inquiry in this case arises under sec. 6 of said act, viz.: "That the Circuit Court of the United States shall, in all suits removed under the provisions of this act, proceed therein, as if the suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said State

court prior to its removal." The purpose of this section is, obviously, that all proceedings after removal shall be as if the suit was originally brought in the United States Circuit Court, and all had in the State court before removal shall stand on the same footing. Hence, when the answer and counterclaim were filed, February 8, in the State Court without the alleged contract in writing, the plaintiff could have interposed a motion for dismissal; but, as the case was removed to this court before opportunity given for such motion, his right to do so still remains. Suppose such a motion interposed here and sustained, what would be the *status* of the case? Under sec. 5, no dismissal of the case should be had, for the plaintiff would not be at fault. If the counterclaim is dismissed, and the case remanded after such dismissal, what effect would such dismissal have, jurisdictionally, it being rendered by a court that had thus decided its own want of jurisdiction in the premises. The act of Congress (sec. 5) provides that when it shall appear to the United States Circuit Court that the dispute is not properly within its jurisdiction, it "shall proceed no further therein, but shall dismiss the suit, or remand it," etc.

Hence, it seems that the first inquiry, on proper motion, is to ascertain whether on the papers, as transmitted to this court, it will remand, sustain a motion to dismiss the counterclaim, or will permit the defendants here to do what should have been done in the State court. Under the later rulings of the Missouri Supreme Court, the counterclaim is subject to dismissal on motion. If such a motion is made and granted, the case will have to be remanded. The anomalous position the case will then occupy in the State court can not be avoided.

The judgment of this court for dismissal of counterclaim, if its jurisdiction is to be thus determined, may or may not prevent the State Court from allowing the same to be re-instated and the filing of the written contract. All this court will have decided is that the motion to dismiss the counterclaim is sustained, whereby it will have decided that it has no jurisdiction of the case, and that the same should be remanded at defendant's costs. If the motion to remand, in the present state of the record, is overruled, then, under section 5 of the Act of 1875, it may appear, through proper motions, that this court has not properly jurisdiction of the case, and the order to remand may hereafter be granted. The Supreme Court of Missouri has held that under the State Practice Act, *profert* is not necessary; and that advantage of the non-filing of a written contract must be taken by motion. If a case is removed to this court, without opportunity for making such a motion in the State court, and such motion is made here, will this court permit such contract to be filed here, and thus give the case here a position, jurisdictionally, different from what it had when removed? Can the removing party thus obtain jurisdiction, or escape the consequences of his position in the State court? Must he not abide by the record as it stood? Or may he assume that as no motion to dismiss was made before removal, the case here has the same status as if the contract had been filed before removal? These difficulties are suggested with a view of determining the true meaning of the statute as to the amount in dispute. Under the Act of 1789, the defendant, on entering his appearance, had to then file his petition for removal, and there is a long line of decisions that the amount was to be determined by plaintiff's demand. Indeed, no other criterion could be had in the then state of the record. Since then, various acts of Congress have granted permission to remove at other stages of the proceedings; but none has changed the rule as to the amount in dispute, or the rule by which it is to be ascertained; unless the adoption of the State practice has so done under the acts of 1872. The rules of law, as established before State practice as to counterclaims existed, are familiar. Is it to be supposed that the uniform rulings of the United States Court were intended to be overturned as to removals, by the act of 1872, independent of all the statutes and decisions concerning the removal of causes?

While the practice acts of the State may prevail as to pleadings, etc., under the United States act of 1872, they can not enlarge or change the United States acts concerning removal of causes from State courts. The amount in dispute still continues to be what plaintiff claims, and not what by counterclaim the defendant may demand.

Motion to remand sustained.

NOTE.—1. This case is interesting in being the second decision in the federal courts, upon the value of a counterclaim in determining the amount in controversy. The point as to the validity of the counterclaim — though sufficient in this case, and well settled by statutes, clinched by the favorable constructions of the Supreme Court of this State—is not a question as to the merits and will not be further noticed here.

2. The body of the doctrine enunciated in the principal case, that the amount in dispute is determined by the claim of the plaintiff, is well settled at common law in a long line of U. S. Supreme Court decisions, beginning as far back as 1842 with the case of Gordon v. Longest, 16 Peters, 97. This case was brought up by writ of error to the Kentucky Court of Appeals, which affirmed the decision of the circuit court of that State refusing the petition for removal to the Federal Court on the ground it did not appear to the court's satisfaction, that the amount in controversy exceeded $500, exclusive of costs, as required by statute. The damages claimed in the writ and declaration were $1,000. The case was reversed and remanded, McLean, J., holding that "the damages claimed in the writ and declaration were unquestionably the sum in controversy." Then follow several decisions, notable among which is Kanouse v. Martin, 15 How., 198-207, in which Curtis, J.,

summing the authorities, lays down the rule as settled, that "until some further judicial proceedings have taken place, showing upon the record that the sum demanded is not the matter in dispute, that sum is the matter in dispute, in an action for damages." And finally, in the progress of the cause of Lee v. Watson, 1 Wall. 337, an amendment was made to the amount of damages claimed for the purpose of bringing the case within the appellate jurisdiction of the Supreme Court, and that court held an amendment insufficient to confer jurisdiction. Mr. Justice Field delivered the opinion of the court, that "by matter in dispute is meant the subject of litigation—the matter for which suit is brought—and for which issue is joined, and in relation to which jurors are called, and witnesses examined. In an action upon a money demand where the general issue is pleaded, the matter in dispute is the debt claimed and its amount, as stated in the body of the declaration, and not merely the damages alleged." This decision, rendered in 1869, closes a list which, from a common law standpoint, furnishes sound precedents for almost every conceivable phase of the question.

3. When many of the States formulated the various statutory departures from the common law practice into a system of code pleading and practice, among other innovations upon the old procedure, the doctrine of counterclaims grew apace, allowing defendants to set up new matters, existing in their favor and against plaintiffs, and if their value exceeded plaintiffs' demand, to recover the excess by judgment over. Then the common-law rule, that plaintiff's demand determines the amount in controversy, was necessarily amended to read, "the largest sum claimed, etc.;" and upon this measure of jurisdiction, suits were taken to the State appellate courts.

4. In order to assimilate the practice of the Federal Courts to this new system, Congress passed an act in 1872, known as the Practice Act, which provides that "the practice, pleading, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." By this act harmony was restored; new life was infused into the Federal Courts, and they were enabled to accomplish the main object of their existence,—to administer the laws of the State, free from local influences, with equal justice to the citizen and the alien; thus fulfilling all those duties which constitute them embassadors to a State from the people of the Union. When the act of March 3, 1875, was passed, allowing "either party" to remove, "at any time before trial or final hearing," etc., the door for removals was indeed thrown "wide open," as the learned judge remarks in the principal case; and it is to be hoped it will never be closed.

5. Issue will not be taken here upon the soundness of reasoning which led to the establishment of the doctrine of counterclaims, inasmuch as it is effectually and finally settled. It may be sufficient to say, it is one of the results of modern progress in the science of law. It is certainly sufficient for the purposes of this article, that it is a law of the State, which the Federal Courts are bound to enforce, and it can only be enforced under the State "practice, pleadings, and forms and modes of proceeding" to which the Federal Courts are required by the Practice Act to conform.

6. The common-law rule that "the plaintiff's demand shall determine the amount in controversy" is not, in fact, incompatible with the consideration of counterclaims in determining the amount; for if the counterclaim exceeds the plaintiff's claim, the relations of the parties are *ipso facto* reversed, and the defendant becomes the real plaintiff. The State courts hold, however, that the criterion by which the amount in controversy shall be determined, is "the largest sum for which judgment may be given;" and this, being no infringement upon any United States statute—for the rule that the plaintiff's demand govern is purely a common-law one—is binding on the Federal courts. This view has been taken in the only other case upon the subject since the act of 1872, Clarkson v. Manson, 4 Fed. Rep. 257. In this case the plaintiffs sued for $195 in State court—New York. The defendant in his answer denied the allegations of the petition, and set up a counterclaim of $750 damages. The reply denied the answer. A removal to the Federal court was granted to defendant as a citizen of New Jersey, on the ground that the amount in controversy exceeded $500, exclusive of costs. Blatchford, United States Circuit judge, denied the motion to remand in the following language: "* * * * * the defendant here contends that the matter in dispute on the issue raised by the counterclaim in the answer and the reply thereto, exceeds $500, exclusive of costs; that there is a controversy in regard to such matter, made a controversy exclusively by the plaintiff by his reply to the counterclaim; and that on this ground the defendant can remove the whole claim into this court. * * * * In view of the facts that the suit is, in form, one brought by the plaintiffs against the defendants, and includes the plaintiffs' claim by the voluntary act of the plaintiffs, and is made to include the defendant's claim by the operation of the statute of New York; and that thus there is but one suit, though there are two controversies in it; and that the whole suit is to be removed; and that either party may remove it; and that the counterclaim necessarily 'must tend in some way to diminish or defeat the plaintiff's recovery,' it follows that the whole suit is removed, including

all the issues, by the complaint, the answer and counterclaim, and the reply. Motion of plaintiffs to remand is denied."

T. A. MARSHALL, JR.

MISREPRESENTATION — DECEIT — PROSPECTUS OF COMPANY.

ARKWRIGHT v. NEWBOLD.

English Court of Appeal, February 28, 1881.

Vendors agreed to sell a paper mill and business as a going concern to a trustee on behalf of a company about to be formed for £32,500, and to accept £15,000, part of the purchase-money, in fully paid-up shares of the company. The prospectus of the company was then issued, stating that the remuneration of the directors would be fixed by the shareholders, and that it was proposed that they should be paid only by a commission on the profits made, no promotion-money being paid by the company, and all formation expenses whatever being paid by the vendors. The vendors, who were themselves the original directors, presented part of their fully paid-up shares, of the nominal value of £4,000, to certain persons of influence in the paper trade to induce them to become directors of the company. After the shares had become depreciated in value, an original allottee of shares brought an action against the directors, claiming damages for deceit and misrepresentation in the statements contained in the prospectus. *Held*, that the statement as to the remuneration of the directors contained in the prospectus did not amount to a misrepresentation sufficient to support an action for deceit.

Appeal from a decision of Fry, J.

The argument in the Court of Appeal was confined to the question of the misrepresentation contained in the following clause of the company's prospectus:—"The remuneration of the directors will be fixed by the shareholders, and it is proposed that they shall be paid only by a commission on the profits made, no promotion-money whatever being paid by the company, and all formation expenses being paid by the vendors."

Kay, Q. C., *Addison, Q. C.*, and *Romer*, for the appellants.

North, Q. C, and *H. A. Giffard*, for the respondent.

JAMES, L. J.—I am of opinion that the judgment of Mr. Justice Fry in this case can not be sustained. With all deference to the learned judge, I think there has been a confusion between two different kinds of wrong, and two different kinds of remedy, between a *mala praxis* as between a vendor and a purchaser, and such a *mala praxis* as is sufficient to form the ground of an action of deceit. There are a great number of purely equitable considerations which come before the court when it is dealing with actions to set aside contracts, when there has been some misrepresentation or concealment or suppression of facts, or some misdealing between a vendor and a person who stands in a fiduciary relation to the purchaser. But those cases are quite distinct from the one now before us. In the present case it was merely an accident that the defendants were, or had been, the directors and solicitors engaged in the transaction. The action is really the same as if it had been brought against a financial agent employed at a commission to float the company, and who had issued the prospectus with all the knowledge that these directors had. If such a person in such a case would have been liable to the plaintiff in an action, the directors would be liable on precisely the same grounds and to the same extent. The plaintiff must make out that he was deceived by the false representation which he alleges was made by the person who prepared and issued the prospectus. It was conceded that there had been an improper dealing between the vendors and the persons whom they procured to become directors of the company. But the question we have to decide is, whether there was an actual misstatement in words in the prospectus, or such a suppression as made that which was stated false. The statement of a thing partially may be a false statement. If something is left out which would qualify that which is stated, that is as much a misstatement as anything that can be conceived. But mere silence cannot be the ground of an action of deceit.

In the present case there has been nothing which, in my view, amounts to any misstatement whatever. The price to be given for the property was truly stated, and every word of the rest of the statement which has been mainly relied on by the plaintiff was, in my opinion, strictly true. The remuneration of the directors was to be fixed by the shareholders, and it was proposod to pay them by a commission on the profits. To say that no promotion-money was to be paid by the company meant that the shareholders would have the property free from any expense beyond the price which was to be paid for it. The vendors were to pay all "formation expenses." That necessarily included "promotion expenses," which are the principal part of the expense of forming a company. Promoting a company is really the obtaining of shareholders for it, and that is the principal thing to be done in forming a company. It is said that there was in the present case a scheme for selling the property for £28,000 as the real price, and that then the price was altered to £32,000 for the purpose of getting the difference of £4,000 for division among the promoters. But there was not the slightest evidence of anything of the kind. Every vendor, when he sells, fixes a price which will cover his expenses of selling; and it is well known that auctioneers' and solicitors' charges always absorb a considerable part of the gross purchase-money. In order to prove that the promotion-money was paid by the company, it must be shown that the price agreed on for the property was swollen and exaggerated for the purpose of making the company pay the promo-

tion expenses in addition to that which was the real price of the property. The plaintiff has failed altogether in doing this, and he can not now fall back on the question of the remuneration of the directors. And I may add that it does not strike me as anything very extraordinary that such a sum should have been given to persons who were to act as directors of a company which would perhaps be of no great value unless it were made valuable by their experience and exertions.

COTTON, L. J.—I am of the same opinion. I do not think that Mr. Justice Fry has drawn sufficient distinction between an action of deceit and an action to set aside a contract. To support an action of deceit, it is necessary to prove that a statement has been made which was false to the knowledge of the person making it, and that the person suing has acted upon it. Of course, an omission may be such as to make a statement false; but mere omission, whatever right it may give to set aside a contract, is not of itself sufficient to support an action of deceit. The representation must be made either with a knowledge of its falseness, or with reckless disregard of whether it is true or not.

Now, as to the facts, I adopt what Mr. Justice Fry found in favor of the plaintiff—that there was at least a proposal before the issue of the prospectus that something should be given to the directors, but that there was no actual bargain or contract previous to the agreement for sale of the estate, which bears date the 19th of April. But the respondent has contended that the learned judge did not go sufficiently far in his favor as regards the existence or not of a bargain prior to the 19th of April. But, in fact, all the circumstances were against the suggestion that the real purchase-money being £28,500, loaded with a sum of £4,000, was to be devoted to the purposes of promotion-money. There had been a previous offer for a cash payment of £30,000, made by a Mr. Carlile to the owners of this property, which had been refused. It is, therefore, made out to my satisfaction that £32,500 was the real purchase-money, and without any agreement which bound the vendors to deal with their purchase-money or any part of it in any way. There is only one clause in the prospectus which is said to contain any misstatement. That is the clause as to the promotion-money. But, in my opinion, the intention of that clause was to state to the intending shareholders what was to be paid by the company, and by the company only. There is no statement in the prospectus as regards any payment to the solicitors of the company; the statement refers to the directors only, and without making any narrow distinction on that point, I will deal with the whole case as if it were against directors only.

Now, as to the promotion-money, the statement is precise: "No promotion-money whatever being paid by the company," It is now desired by the plaintiff to read this statement as if the words, "by the company," were not in it. But is that right? The words can not be reasonably looked upon as a statement that nothing would be paid by the vendors. And an unnatural construction must not be put on the words for the purpose of supporting an action for deceit. The pleader pleaded an antecedent secret agreement; but as that plea has failed, the result is to establish that the £4,000 was paid by the vendors, and not by the company; and it is impossible to say in the face of that, that there was anything deceitful in the original statement. Then it is said that the statement became falsified by what afterwards took place; that the £4,000 worth of shares being given to the directors for their services, although they were given by the vendors, falsified the statement that "the remuneration of the directors shall be fixed by the shareholders, and it is proposed that they shall be paid only by a commission on the profits made." In my opinion this meant that there was not to be a fixed sum paid to the directors, but that their remuneration as directors was to be determined by a general meeting. The word "only" referred to what was to be proposed at the general meeting, and conveyed no assurance that they might not get from the vendors, or from somebody else, something for agreeing to become directors. It appears that Mr. Justice Fry relied on the word "proposed," but, in my opinion, that reliance falls to the ground, holding that it was not a statement that nothing should be paid to the directors by anybody else, but only a statement that the company were not bound to give a fixed sum, it being left to the meeting of shareholders to base the remuneration upon the profits.

I have dealt with that part of the case to show that, in my opinion, there was no ground for reliance on that part of the prospectus for maintaining the action. But, in my opinion, it would not be right in an action of deceit to give a plaintiff relief on the ground that a particular statement, or a construction put on it by the court, was erroneous or false, when the plaintiff himself, in his evidence, does not venture to say that he understood the statement in the sense in which the court construes it. If the plaintiff did not put that construction on it, even if that construction is falsified by the facts, he was not deceived, and was not induced to act as he did through having been deceived by any misstatement of the defendant. On that ground alone I should have been prepared to dispose of the action.

LUSH, L. J.—In my opinion, also, the learned judge in the court below has allowed his mind to be diverted from the real question at issue. As to the remuneration being fixed by the shareholders, that was perfectly true, because it was only a statement of a provision contained in the articles of association which had been registered. The directors, it was said, were to be paid by commission only, which, of course, meant that they were to have a direct interest in making the concern a profitable one by limiting their remuneration to a

given share of the profits. Indeed, I am surprised that anyone can read the prospectus in any other sense. The plaintiff did not undertake in his evidence to say that he understood it in any different sense; but alleged that before the agreement for the purchase was made, it was agreed between buyer and seller, the buyer being the agent on behalf of the company, that £4,000 should be added to the purchase-money in order that it might be distributed and given back to the directors. He, on that ground, contended that the statement in the prospectus that no promotion-money was to be paid by the company was false, because the company would have had in that way indirectly to pay £4,000 for promotion-money. Now it has been established that there was no bargain whatever made before the contract for the sale of the estate about any sum being added to the purchase-money. To my mind this is clear, because the vendors of the estate had refused £30,000 from another purchaser. The vendors asked £35,000, the buyers for the company offered £30,000, and ultimately the parties split the difference and agreed at £33,500. The statement that £28,500 was the purchase-money is entirely falsified; and, to my mind, this disposes of the case. It does not seem material to consider when the agreement by the vendors to give shares to the gentlemen whom they induced to become directors was made, or what it was for, because it is clear that the statement in the claim on which the whole action was based, is entirely disproved. It was an action for false and fraudulent misrepresentation; and, in order to prove that, the party complaining must show that there were false statements in the prospectus, by reason of which he was induced to take the shares. I have come to the conclusion that the statements in the prospectus complained of were true. It was true that the remuneration of the directors was to be fixed by the shareholders. It was not proved to be untrue that the directors intended at this time to propose to the shareholders to pay them by a commission only on the profits; and it is established that no promotion-money was in fact paid by the company. A great many considerations have been let in and presented in argument which have no relation at all to the issue raised in the action. Acts had been done which were not right to be done, but that ought not to affect at all the case made by the plaintiff, or any right he could have to complain of the conduct of the parties in an action of this kind.

Appeal allowed, and action dismissed with costs.

DEATH BY WRONGFUL ACT—ACTION UNDER THE STATUTE OF ANOTHER STATE.

LEONARD v. COLUMBIA STEAM NAV. CO.

New York Court of Appeals, February, 1881.

1. The plaintiff's intestate was killed by the explosion of the boiler of the steamer Adelphi, while in the harbor of South Norwalk, Connecticut. Letters of administration were issued to plaintiff by the Surrogate of New York County, which showed upon their face that the intestate died leaving assets in the State and County of New York. The plaintiff averred in his complaint, and proved upon the trial, that the statutes of Connecticut gave a right of action to the representatives of a person killed by the negligence of a corporation, in certain cases, the damages not to exceed $5,000, such law being similar to New York statutes. *Held*, on appeal from judgment on a verdict for $5,000, that the right of the administrator to bring the action in this State was clear, the rule being that personal actions, whether *ex contractu* or *ex delicto*, being transitory, may be brought anywhere, and are governed by the *lex fori*; and the cause of action under the Connecticut statute, being of such transitory nature, can be enforced in the courts of this State, provided our laws do not forbid its maintenance.

2. It is not essential that the statute in the place where the wrong is committed should be precisely the same as that of the State where the action is brought, but that it should be of similar import and character; and the statutes of New York and Connecticut upon this subject are founded upon the same principle, and possess the same general attributes.

3. It was not essential that letters of administration should have first been taken out in Connecticut.

4. The interest upon the verdict not having been added upon the trial, but inserted in the judgment on the taxation of costs, the question as to the right to recover interest should have been reached by a motion to re-tax the costs or to correct the judgment at special term, and not by appeal.

D. & T. McMahon for appellant; *Christopher Fine* and *Leopold Turk* for respondents.

MILLER, J., delivered the opinion of the court:

The intestate was killed by reason of the explosion of a boiler of a steamer, within the boundaries of the State of Connecticut, which the jury found was occasioned by the negligence of the defendants, who were owners thereof. The statutes of that State created a cause of action in favor of and for the benefit of the next of kin and heirs at law in certain cases which are enumerated. By the Revised Statutes of 1875, sec. 3, p. 488, a right of action is given to the representatives of a person killed by the negligence of any railroad company or its servants, to recover damages to the amount of $5,000. By the provisions of the statutes of that State, the common-law rule as to actions for injuries to the person is changed, and it is provided that an action to recover damages for injury to the person, etc., shall not abate by reason of death, and that the executor or administrator may prosecute the same; and that all actions for injury to the person, whether the same do or do not instantaneously or otherwise result in death, shall survive to his executor or administrator, etc. Statutes of Connecticut, revision of 1875, chap. 6, title 19, secs. 8, 9. It is held that under these provisions of the statutes of Connecticut, an action lies in that State in favor of the representatives of a deceased party to re-

cover damages. Murphy v. New York, etc. R. Co., 30 Conn. 184; s. c., 29 Conn. 496; Soule v. New York, etc. R. Co., 24 Conn. 275.

The construction thus placed by the courts of another State upon the statutes of that State should be followed, and is controlling in the tribunals of this State. Jessup v. Carnegie, 80 N. Y. 441; Hunt v. Hunt, 72 N. Y. 218.

At common law, personal actions, whether *ex contractu* or *ex delicto*, are transitory. Bouvier Law Dict. Personal actions, transitory actions, and these actions may be brought anywhere, and are governed by the *lex fori*. Bouvier; Story on Conflict of Laws, sec. 307, a. e. The cause of action which the statutes of Connecticut created is transitory in its nature, and unless excepted from the general rule as to places where such actions may be brought, can be enforced in the courts of this State or any other forum, provided the laws of that forum do not forbid its maintenance. In this State it is held that actions will lie for injuries to the person, committed outside of the territorial limits of the State. In Smith v. Bull (17 Wend. 323), it was decided that an action for an assault and battery committed in the State of Pennsylvania could be maintained in any court of common pleas of this State. The rule, no doubt, is, that all common-law actions for an injury in a foreign country are transitory in their character, and may be brought in another State or country besides that in which they originated. In contemplation of law the injury arises anywhere and everywhere. The right to recover in such cases rests upon the presumption that the common law prevails in such other State, and that the injured party could have recovered there had the action been brought in such State. The remedy in such cases is given by the courts of one country or State upon the principle of comity which is due by one sovereign State or country to another under similar circumstances. While these general rules are recognized in numerous decisions in the courts of this State, it is also held that the statutes, giving an action for damages resulting from death caused by culpable negligence, do not apply where the injury was not committed in this State, but in a foreign country, unless it is proved that the laws of that country are of a similar character. Whitford v. Panama R. Co., 23 N. Y. 465; Beach v. Bay State Steamboat Co., 30 Barb. 433; Crowley v. Panama R. Co., Id. 99; McDonald v. Mallory, 77 N. Y. 547.

These decisions rest upon the principle that the statutes of this State can have no operation in a foreign country where similar statutes do not exist, and that it is not a legitimate presumption that the statute laws of other States or countries are similar to our laws. In Whitford v. Panama R. Co., *supra*, the injury was done in New Granada. After considering the effect of the statutes in a foreign country, Denio, J., remarks: "Whatever liability the defendant incurred by the laws of New Granada, by the act (facts) mentioned in the complaint, might well be enforced in the courts of this State; * * * but the rule of decision would still be the law of New Granada, which the court and jury must be made acquainted with by the proof exhibited before them." The doctrine of this case is approved in McDonald v. Mallory, *supra*, and it is laid down by Rapallo, J., that where the wrong is committed in a foreign State or country, no action "can be maintained here without proof of the existence of a similar statute in the place where the wrong is committed." The rule here laid down is just and reasonable; and it is not essential that the statute should be precisely the same as that of the State where the action is given by law, or where it is brought, but merely requires that it should be of a similar import and character. The statute in this State is certainly of the same nature, and the similarity is such as to authorize the conclusion that it is founded upon the same principle, and possesses the same general attributes, as the statutes of Connecticut which have been cited. The same remedy was to be accomplished, and an examination of the different provisions evinces an agreement in both of the statutes as to their main features, and that they are substantially alike and to the same effect as to the survivorship of the action. In fact, when there are similar statutes instead of the common law, the right to recover damages stands precisely the same as if the common law in both States relating to the subject prevailed. The doctrine, that an action will lie when the common law or the statutes of different States or countries correspond, is sustained by numerous authorities. Madrazo v. Willes, 3 Barn. & Ald. 353; Melan v. Duke De Fitz James, 1 Bos. & Pul. 138; Mostyn v. Fabrigas, 1 Cowp. 161: 1 Smith's Leading Cases, 765; Skipp v. McGrau, 3 Murphy (N. C.), 463; Wall v. Hoskins, 5 Iredell, Law, (N. C.), 177; Stout v. Wood, 1 Black (Ind. 71.

We are referred to a number of cases by the learned counsel for the appellant as authority for the position that the death happened in the State of Connecticut, and there not being shown to have been any representative there who had taken out letters of administration, an administrator in New York has no right to bring such an action in the courts. The cases cited are the decisions of other State courts, and a brief reference to them will indicate how far they should be allowed to bear upon the question considered. In Richardson v. New York Central R. Co. (98 Mass. 85), the plaintiff brought an action for damages under the statute of New York, for the killing of the intestate in New York. There was no statute in Massachusetts of a similar character, and it was held that the action could not be maintained. It will be noticed that the statutes of the different States were not of a similar nature, and the common-law rule prevailed in Massachusetts. The case, therefore, is not analogous.

In Woodward v. Michigan, etc. R. Co. (10 Ohio, 121), it was held that an administrator in Ohio

could not maintain an action under the statute of Illinois authorizing the personal representatives of a person who comes to his death by a wrongful act of another to sue for damages. It was questioned whether the petition went far enough to make out an action under the statute of Illinois, or whether an administrator appointed under the laws of Illinois might not maintain an action.

The question now presented is not fully considered, and, therefore, the decision has no force as a case in point. In Needham v. G. T. Railway Company (38 Vt. 295), the death occurred in the State of New Hampshire, and there was no law existing, or alleged to exist, which gave the plaintiff a right of action. In Allen v. Pittsburg, etc. R. Co. (45 Md. 41), there was no allegation that there was any statute in the State where the death was caused creating a cause of action; and it was held that in the absence of any proof there was no presumption in favor of a positive statute law of the State, but it must be presumed that the common law prevailed. The case, therefore, is not in point. In Selma R. Co. v. Lacy (43 Ga. 461), the same general state of facts existed, and the same rule was recognized. Marcy v. Marcy (32 Conn. 308), does not directly affect the question considered. From this review of the cases it is manifest that the authorities cited do not sustain the position that this action can not be maintained in this case, under the circumstances existing, and we are of the opinion that the right of the administrator to bring this action is clear and beyond question. The letters of administration granted by the surrogate are conclusive as to his authority. Roderigas v. East River Savings Institution, 63 N.Y. 460; Richardson v. West, 80 N.Y. 139. The letters on their face show that the intestate died "leaving assets" in the State and County of New York, and this gave the Surrogate of the County of New York jurisdiction. 3 Rev. Stat., 6th ed., 76, sec. 24. Nor was it essential, we think, that letters should have first been taken out in the State of Connecticut. Be that as it may, however, the letters issued by the surrogate are conclusive as to the right of the administrator to maintain this action.

In regard to the question as to the right to recover interest, there is no evidence that the interest was added to the verdict upon the trial. It does appear, however, to have been inserted in the judgment from the record before us. We may assume that it was added on the taxation of the costs, and the question can only be properly reached by a motion to retax the costs or to correct the judgment at special term, and not by appeal. See Code of Civil Pro., secs, 1346, 1349.

Where a clause is inserted in the judgment without authority, the proper remedy is by motion to correct the judgment, and not by appeal. People, *ex rel.* v. Goff, 52 N. Y. 434; Kranshaar v. Meyer, 72 N.Y. 602; DeLavallette v. Wendt, 75 N. Y. 582.

There was no error in the refusal of the judge to charge any of the requests submitted to him by the defendant's counsel; and after a careful examination, we are unable to discover that any error was committed by the Judge in the various rulings as to the admissibility of evidence.

After full consideration, we think that the case was properly disposed of at the Circuit, and that the judgment should be affirmed.

All concur, except RAPALLO, J., absent, and FOLGER, C. J. who concurs in result.

MUNICIPAL CORPORATION—POLICE POWERS — PROHIBITION OF SLAUGHTER HOUSE.

CRONIN v. PEOPLE.

New York Court of Appeals.

1. The power to "regulate" implies the power to "restrict," and where a city by its charter has power to regulate the erection, use and continuance of slaughter houses, it has power of total prohibition within specified limits or localities.

2. It is not necessary, in an ordinance prohibiting the erection of certain buildings within specified limits of a city, to allege the reason for its enactment: neither is it necessary in an indictment under such ordinance to allege such reasons; as that the erection of such building was injurious to the well-being of the town.

FINCH, J., delivered the opinion of the court.

The plaintiff in error was indicted in the Court of Sessions of the County of Albany, for slaughte ing cattle in violation of an ordinance of the common council of that city, which forbids such act within certain prescribed limits specifically named and described, and directs, in the interest of health and cleanliness, the manner of conducting such business in the localities from which it is not excluded. Penalties are imposed by the ordinance for its violation, which may be recovered in a civil action, or by prosecution as for a criminal offense. The legislature, in 1871, made such violation of a city ordinance a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. Laws 1871, ch. 536. tit. 15, § 1. The accused demurred to the indictment, and raises here in support of his demurrer, the single point that in passing the ordinance in question, the common council exceeded its powers, and the ordinance so passed is inoperative and void. The power of the legislation to confer authority for such municipal legislature is not assailed, but the claim that it has actually done so is strenuously denied.

The argument on behalf of the city is, that the power to pass such ordinance was accidental to it as a municipal corporation, and resulted from its creation as such, without dependence upon particular words; that it was embraced in the powers granted by the Dongan charter of July 22, 1868, and which were reserved to the city by the act of 1842; and was specially conferred by the amended

charter of 1870. Laws of 1870, tit. 3, § 12, sub. 14.

The last named act authorizes the common council of Albany to enact ordinances, with penalties not exceeding one hundred dollars, in the matters and for the purposes thereinafter named; and among these purposes is one contained in subdivision 14, the language of which is as follows, viz.: "To regulate the erection, use and continuance of slaughter houses." The counsel for the defendant contends that the power thus conferred upon the common council does not justify the ordinance for the violation of which the prisoner was indicted; and his argument is that the clause referred to is a clear recognition of the right to erect, use and continue slaughter-houses within the city, and everywhere and anywhere within its limits; and that therefore the authority to regulate them can not be construed to permit a total prohibition in particular areas or location.

We do not think the reasoning is sound. The statute recognizes the fact that slaughter-houses exist in the city, rather than the right to erect them; and recognizing the fact, gives to the common council the power to regulate them. The use of the word "regulate" in the statute is not confined merely to the manner in which the business of slaughtering animals is carried on. To regulate, implies a power of restriction and restraint, and is applied in the charter, and not merely to the "use" of slaughter houses, which would relate to the manner of conducting the business, but also to their "erection" on the one hand and their "continuance" on the other; so that their "erection" in the first instance, and then the mode and manner of their "use" after they are built, and lastly their "continuance" are placed under the regulating power of the municipal authority. It would be a very narrow and technical construction, to say that a power to regulate the erection of a slaughter house is exhausted in prescribing the form or material of its erection, and has no reference to its locality. And the construction wholly fails when applied to the "continuance" of such a structure, and the business carried on within it. How is it possible to regulate its continuance, except by limiting and restricting that continuance, which again can only be done by prohibiting its continued existence? It is the plain purpose of the statute to give to the common council the right to fix and determine the limits and localities within which new slaughter houses may be erected, and the areas from which they shall be excluded; to direct and control the mode and manner of using those so erected, and those already existing, as they may deem the health and cleanliness of the city requires; and to prohibit their continuance wherever they become sources of danger to the health or comfort of the community.

The counsel argues that this construction may result in a total prohibition; that if the municipal control can exclude slaughter houses from the area already named in the ordinance, it can steadily increase and enlarge such area until the business is driven wholly from the city. That does not necessarily follow. It will be soon enough to decide that question when it arises. It is not yet here. We are not to presume that the common council will abuse the authority intrusted to them, or fail to recognize the absolute need of the business to the necessities of the community, while at the same time they feel their responsibility for the health and comfort of the people. It is enough to say for the present that their action is clearly within the authority of the charter.

Our attention is called to other paragraphs under section 12, as tending to throw light upon the meaning of the word "regulate." The suggestion is that where authority to prohibit is intended, some stronger word than "regulate" is used indicating the severer restriction. The language of legislative enactments is not always rigidly precise and accurate, and an argument drawn from the use of specific words is often dangerous; yet, in the present case, the terms of the subdivisions referred to, favor, rather than oppose, the meaning we attach to the word in question. As a general rule, with perhaps occasional exceptions, through all the paragraphs of the section, where some act or thing is not to be permitted at all, anywhere or in any locality, a more restrictive word than "regulate" is used, as to "prevent" and "remove" obstructions in the streets. Where the act or thing is such as may be permitted under proper restraint, at convenient times, in suitable localities, the word "regulate" is used; and where the act is one which it may be wise either to permit under appropriate restraints or wholly to prohibit, the words are used, "to regulate or prevent;" and where a more general and undefined power is intended, involving various details, the phrase adopted is, "in relation to." We see nothing, therefore, in the language of the other subdivisions to change our conclusion, that an ordinance which excludes from a specific place or locality the business of slaughtering cattle, is a regulation of that business, and, therefore, within the power conferred upon the common council by the provision under discussion. Indeed, the precise point was long ago adjudged. In the Village of Buffalo v. Webster, 10 Wend. 100, where a similar ordinance was assailed as in restraint of trade, the court held that an ordinance providing "that meat shall not be sold in a particular place" is good, not being a restraint of the right to sell meat, but a regulation of that right. The same authority disposes of the objection that the ordinance in question is void as being in restraint of trade, following in that respect still older cases: Bush v. Seabury, 8 Johns. 418; Pierce v. Bartram, Cowp. 269; and justifying the principle of the later authorities in which the exercise of such powers by boards of health has been steadily sustained. Metropolitan Board of Health v. Heister, 37 N. Y. 662; Polinsky v. People, 73 N. Y. 65.

If we correctly understand the counsel for the

appellant, he also claims that the ordinance is void because it punishes the prohibited acts "without pretense, or any form of proof that they were injurious to the well-being of the town, or that prudence required its passage." The answer is, that neither in the ordinance itself, nor in the indictment founded upon it, is it necessary to allege or explain the reasons for its enactment or the exigency out of which it grew. It is of the nature of legislative bodies to judge for themselves, and the fact and the exercise of that judgment is to be implied from the law itself. Stuyvesant v. Mayor of New York, 7 Cow. 606; Martin v. Mott, 12 Wheat. 19; Rector, etc. of Trinity Church v. Higgins, 4 Rob. 1.

We do not see, therefore, that any error was committed in the court below. The judgment must be affirmed, and the case remanded for the proper sentence to the Court of Sessions of the County of Albany.

ABSTRACTS OF RECENT DECISIONS

SUPREME COURT OF THE UNITED STATES

October Term, 1880.

MANDAMUS— FUNCTIONS OF THE WRIT.—Application for rule on the Circuit Court of the United States for the District of Iowa, Northern Division, to show cause why a writ of *mandamus* should not issue, denied, "1, because it is an attempt to use the writ of *mandamus* as a writ of error to bring here for review the judgment of the circuit court upon a plea to the jurisdiction filed in the suit; and 2, because, if a writ of *mandamus* could be used for such a purpose, the judgment below was clearly right. Under section 739 of the Revised Statutes, no civil suit, not local in its nature, can be brought in the Circuit Court of the United States, against an inhabitant of the United States, by original process, in any other State than that of which he is an inhabitant, or in which he is found at the time of serving the writ. It is conceded that the person against whom this suit is brought in the circuit court, was an inhabitant of the State of Massachusetts, and was not found in or served with process in Iowa. Clearly, then, he was not suable in the circuit court of the District of Iowa; and unless he could be sued, no attachment could issue from that court against his property. An attachment is but an incident to a suit, and unless a suit can be maintained, the attachment must fall. The act 'providing the times and places of holding the Circuit Courts of the United States in the District of Iowa,' 21 Stat. 155, ch. 120, divides that district into four divisions, and requires suits against an inhabitant of the district to be brought in the division in which he resides. The provision that 'where the defendant is not a resident of the district, suit may be brought in any division where property of the defendant is found' (sec. 2), applies only to suits which may be properly brought in the district against a non-resident. Such a suit, if not local, must be in the division where the defendant is found when served with process; if local, in the division where the property, which is the subject-matter of the action, is situated. There is not manifested anywhere in this act an intention of repealing section 739, so far as it affects the Iowa district. Denied." Opinion by Mr. Chief Justice WAITE.—*Ex parte Des Moines, etc. R. Co.*

TAXATION—INDIANS—SACS AND FOXES.—The plaintiff, Sarah A. Pennock, is an Indian, and a member, by "birth, blood and descent," of the confederate tribes of Sacs and Foxes of the Mississippi. At the date of the treaties of 1859 and 1867, between those tribes and the United States, she was the wife of William Whistler, a member of the same tribe. After his death she intermarried with one Henry Pennock, a white person, a citizen of the United States, and a resident of Kansas, with whom she now lives. In May, 1871, she was the owner in fee of certain lands in Franklin County, in that State, which were listed and assessed by its officers for taxes in the same way as other real property in the county. The taxes and charges being unpaid, the lands were sold to pay them, and certificates of sale given. To restrain the issue of the deeds to the purchasers, and to set aside the tax sale as illegal, the present suit was brought. The district court of the county held the sale legal, and gave a decree for the plaintiff. The Supreme Court of the State reversed the decree and rendered judgment for the defendants, and the plaintiff has brought the case, on writ of error, to this court. *Held*, that as the plaintiff had chosen to take a perfect title (rather than the modified tribal title), to her lands, and had received a patent therefor, with the absolute ownership, she and her property came under the control of the State, and are bound to bear a portion of its burdens. Affirmed. In error to the Supreme Court of Kansas. Opinion by Mr. Justice FIELD.—*Pennock v. Franklin County.*

COLORED SCHOOLS IN THE DISTRICT OF COLUMBIA—SUCCEEDING CORPORATIONS.—In 1870 the Board of Trustees of Colored Schools for the District of Columbia employed the plaintiff, who is an architect by profession, to prepare the plans and specifications for a school-house in Washington, and to superintend its construction, agreeing to give him for his services five per cent. on the cost of the building. This was the ordinary rate of charge as compensation for similar services in the district. In 1872 the building was constructed, and cost about $66,000. The board of trustees approved of the work, and paid the plaintiff $1,100 in cash, and gave him a voucher for $2,155 more, being for the balance due, and also the sum of $255 for services in superintending repairs upon other buildings. This voucher the plaintiff sold and delivered to the Freedman's Savings and

Trust Company, for whose benefit this action is brought. The board of trustees of colored schools have since been abolished, and a new board organized to take charge of all the public schools, whether of white or colored children. But when the original board existed, it was the agent of the district for the purposes entrusted to it, and could bind the district for the services rendered by the plaintiff. The building constructed, and the other buildings upon which the repairs were made under his superintendence, belong to the district and are used by it for colored schools; yet the amount due him for which the voucher was given has never been paid. The jury were of opinion that the district should pay it, and we agree with them. The disallowance of the claim by the board of audit, if such had been allowed to be proved, would not have concluded the plaintiff. That board was not a judicial body, whose action was final; it exercised little more than the functions of an accountant. A claim allowed by it was not necessarily a valid one; a claim disallowed was not, therefore, illegal. Its action either way left the matter open to contestation in the courts. Though the contract of the plaintiff with the board of trustees was made before the act creating the district into one municipal corporation, the work was not completed until afterwards, when it was accepted and approved. The new corporation succeeded to the property of the two former ones, and also to their liabilities. Affirmed. Opinion by Mr. Justice FIELD.—*District of Columbia v. Cluss.*

SUPREME COURT OF MISSOURI.

February 1881.

ADMINISTRATOR—FAILURE OF DUTY—WIFE'S ABSOLUTE PROPERTY.—Suit against Benton P. Taylor on his administrator's bond to recover the sum of $882.17, for property unaccounted for belonging to said estate, and for neglect of duty in not collecting certain debts due the estate. The court at the trial gave the following instructions: 1. The court declares the law to be that if the said Benton P. Taylor failed to exercise such diligence in and about the collection of the notes set forth in breaches five and six in relator's petition, as a prudent man would exercise in and about his own affairs, then the said Taylor is liable on said bond to the amount of damages which said estate may have sustained by reason of his failure to exercise such diligence. 3. If the court should believe from the evidence in the case, that the said defendant, Taylor, could by the institution of suit and prosecution of suit and prosecution of same to judgment and execution against Burr Feagan, one of the makers of the notes set forth in breaches five and six of relator's petition, have collected the amount of same from him, and that in failing to take such steps said estate has been damaged thereby, then the court must find for relator in such sum in said breaches as said estate has been damaged. *Held*, that they were properly given—Sherwood, C. J, not concurring on this point. An instruction to the effect that a sewing machine could not be allowed the wife of the deceased under sec. 33, W.S. page 88, was properly refused, there being no sound reason why a sewing machine should not be included in the expression "other implements of industry. Affirmed. Opinion by SHERWOOD C.J. *State ex rel. Steers v. Taylor.*

March 1881.

DEED OF TRUST—SALE OF PROPERTY IN MASS—PUBLICATION OF NOTICE OF SALE.—The mere fact that property, which is susceptible of division, has been sold under a deed of trust in mass, will not render the sale void. It is only where a substantial injury has been inflicted by a failure to subdivide and sell in parcels, that a court of equity will interfere and set the sale aside. Kelly v. Hunt, 61 Mo. 469. If no steps be taken to avoid such sale, it must of course be regarded as valid. When thirty days' notice of sale is required, thirty days should of course intervene between the first publication and the day of sale; and although it may be customary and prudent to continue the notice in every issue of the paper from the first insertion to the day of the sale, yet it has been expressly decided that thirty days' notice, in a daily paper, does not mean thirty days' daily notice in such paper. White v. Malcom, 15 Md. 543; Johnson v. Dorsey, 7 Gill. 286; Lefter v. Armstrong, 4 Iowa, 482. Where, however, the notice has not appeared in every issue of the paper from the first insertion to the day of sale, and the omission to make a continuous publication is of such a character, or is attended by such circumstances as to mislead the public and work injury to the party whose property is sold, the sale may be set aside. Stine v. Wilkson 10 Mo. 96. To avoid such a contingency, therefore, in all cases where notice is required to be published in a daily paper, the notice should be published in every issue from the first insertion up to and including the day of sale. Affirmed. Opinion by HOUGH, J.—*German Bank v. Stumpf.*

JUDGMENTS OF PROBATE COURTS—RES ADJUDICATA—CURATOR'S BOND.—The decisions of this court are numerous to the effect that final settlements made in probate courts by curators, and others acting in similar capacity, occupy the same footing to all intents and purposes as do the judgments of other courts of competent jurisdiction. In pleading such judgment as *res adjudicata*, it is equally conclusive whether it be formally pleaded or, as supporting the general issue, be offered in evidence. Marsh v. Pier, 4 Rawle, 288; 1 Greenlf. § 531, and cases cited; Bigelow on Estoppel, 590, and note; Krekeler v. Ritter, 62 N. Y. 372; Miller v. White, 50 N. Y. 137. A curator is not liable to an ordinary action for money had and received; but resort must be

had to a suit on his bond which constitutes the measure and limit of his liability. Cohen v. Atkins (decided at this term); Cole v. Eaton, 8 Cush. 587; Conant v. Kendall, 21 Pick. 36; Schouler's Dom. Rel., 501, *et seq.* Reversed. Opinion by SHERWOOD, C. J.—*Garton v. Botts.*

QUERIES AND ANSWERS.

[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

19. A deposits money in a private bank of discount and deposit in 1860, and checks out various amounts in 1861, leaving a balance to A's credit. It is understood between A and the bank, that the balance shall remain to A's credit to be applied to A's funeral expenses, and that it will not be checked out before A's death. Twenty years elapse and, in the meantime, the partnership operating the bank changes repeatedly, notices of dissolution, etc., being given at various times in the papers. The remaining partners fail, and A brings suit against the partners who were in the bank at the time of her deposit, but have since withdrawn, for the balance due. Can A recover at all; if so, against whom? S.

Cincinnati, April 9, 1881.

20. A and wife execute to B, as trustee for C, their deed of trust on real estate in Missouri, to secure payment of promissory note; in case of default trustee is authorized to sell at public sale, first giving, however, —— weeks' notice by advertisement in some newspaper. The scrivener has omitted to fill the blank as to how many weeks' notice is to be given. Can the trustee convey the title under a sale by giving notice for a reasonable time, such as is usually given under deed of trust sales, or must resort be had to a court of equity to enforce deed of trust? C.

21. A statute of our State provides that a person practising law without license shall be fined $250. A, being unlicensed, performs services as attorney which are reasonably worth $500, and the employer (client) is perfectly satisfied with results, but refuses to pay. There was no contract covering fees. Can A recover on a *quantum meruit*? If so, how, and how much?

Woodville, W. Va. F. B. J.

22. A sells B a tract of land upon credit; executes a deed which is duly recorded, and in the deed reserves a specific lien on the land for the unpaid purchase-money. After the sale, a railroad is constructed through the land by a deep cut. To this railroad, B, who is in possession, gives the right of way. For years the railroad company fail to finish the road. In the meantime A files his bill, has the land sold (without notifying the railroad company, to enforce his lien); at the sale buys back the land and has title vested in him, leaving B largely indebted to him upon the original debt. The railroad company now propose to complete the road. Have they any title to the right of way? If not, what is A's remedy against them? L.

RECENT LEGAL LITERATURE.

PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY, being a Treatise on the General Principles Concerning the Validity of Agreements; with a Special View to the Comparison of Law and Equity, and with References to the Indian Contract Act, and occasionally to Roman, American and Continental Law. By FREDERICK POLLOCK, LL.D. First American from the second English edition, with notes. By Gustavus H. Wald, of the Cincinnati Bar. Cincinnati, Robert Clarke & Co., 1881.

This edition of Mr. Pollock's treatise presents to the American bar one of the best, if not the very best, of the modern English works on the law of contract. Mr. Pollock's treatise was first published in England, in December, 1875, and in April, 1878, a second edition was issued. His view in adding another to the existing works on the general subject, as stated by him in the preface to the first edition, was to consider, more particularly than had been previously done, the doctrines of courts of equity on questions arising upon contract,—questions of more weighty importance day by day, and which, except in distinct treatises on equity jurisprudence, have been hastily considered by earlier authors who were accustomed, as a rule, to confine themselves to the common law parts of the subject. For these reasons, there was abundant demand for such a treatment of the law of contract; and for these reasons, as well as for the excellence of the execution of the task, Mr. Pollock's treatise was not long in receiving the stamp of professional approval in his own country.

The divisions and general arrangement of the work tend greatly to facility of reference. Chapter I treats of Agreement, Proposal and Acceptance, and answers the question "Is there an agreement concluded in terms?" Chapter II treatt of the Capacity of Parties and the question "Is is made between competent parties?" Chapter III discusses, Form of Contract: "Does it satisfy the requirements of the law as to form?" Chapter IV, Consideration: "Does it satisfy the law as to consideration." Chapter V, Persons Affected by Contact; "Who may now or hereafter sue or be sued upon it?" Chapter VI, Unlawful Agreements: "Is there anything in the agreement to interfere with its validity by reason of unlawfulness of object?" Chapter VII, Impossible Agreements: "Is there anything in the agreement to interfere with its validity by reason of its impossibility of performance?" Chapter VIII, Mistake: "Is there anything to prevent the expressed consent of

the parties from having its full effect by reason of mistake?" Chapter IX, Misrepresentation. Chapter X, Fraud. Chapter XI, Duress and Undue Influence: "Is there anything to prevent the expressed consent of the parties from having its effect by reason of misrepresentation, fraud, duress or undue influence?" Chapter XII, Agreements of Imperfect Obligation. "Is there any other reason why the agreement is not enforceable?" As in nearly all English law books, considerable space is devoted to the examination of individual cases of prominence, the author quoting at length from the judgment of the courts, and stating the facts very fully. There is an advantage in this mode both to the student and the practitioner, which has not always been recognized by our own writers.

Mr. Pollock must be congratulated upon the manner in which his work is presented to the profession on this side of the water. Not every English law writer of the past decade has been able to say that he was proud of the child of his pen as he saw it arrayed in its Transatlantic dress; more than one there are, we may imagine, who can never look upon the American edition of their books without a shudder, as they stand before them in their cheap and shrunken bindings, printed on poor paper, with poor type and worse ink, after escaping the vagaries of an uneducated proof reader, and the hasty and unconsidered additions of an incompetent editor. Mr. Pollock will not be called upon to endure this. The typography of the book before us is fair; though not up to the standard attained by at least two American publishers of law books, its mechanical execution hardly deserves any adverse criticism. But most important of all is the work of the American editor, and this, after a thorough examination, we must commend as most excellent. Seldom has an English law book received such careful and exhaustive annotation at the hands of an American lawyer; rarely has an English law writer obtained so learned and diligent an editor. Mr. Wald was to our personal knowledge peculiarly competent to undertake the editing of a work on contract, for the reason that for several years previous to undertaking the work, he had made the law of contracts his particular study. In the preparation of this edition he has not sacrificed thoroughness to speed, and rather singularly, for these times, a publisher's usual eagerness to forestall the market has been wanting, and nearly three years of close application and study are represented in Mr. Wald's notes to the present treatise. We have not space to particularize, and therefore shall not attempt here any detailed examination of Mr. Wald's additions; but the close scrutiny to which we have subjected the book during the fortnight it has been in our hands, failed to suggest anything lacking either in his method or in his execution. In the English edition the table of cases cited covered sixteen pages; the American edition has added thirty-four pages, making in all, fifty pages of cases, and a book of nearly 800 pages in all. Mr. Pollock's Treatise and Mr. Wald's notes present the latest view of the law of contracts as administered in the courts of England and America.

J. D. L,

NOTES.

——Says the *New York Daily Register*, in discussing the question as to whether lawyers are good-natured: There is a difference of opinion on this subject. Witnesses under cross-examination think they are not. The fact is, that if their trials are considered, they will be deemed the most good-humored people in the world. Wit and humor are not always in place, either at the bar or on the bench. With all their wit and keenness, the gravity of a judge has become a proverb. The place for a judge to be witty is at the table. Fun may disconcert the most momentous affairs. The humorous old lady who had made a will several times, and being about to re-execute it, and being asked in the presence of witnesses whether it was her last will and testament, said she did not know about that, involved her estate in litigation, because a matter-of-fact witness testified the old lady said she did not know whether it was her will or not. The most experienced old solicitor, full of confidences, investments, family secrets and privileged communications, generally is so sedate and unimpassive that he passes sometimes for a most ungenial temper, but he may be all the more trusted for his reticence and gravity. But with all allowances for caution, good humor is a great instrument with a successful counsel, and wins many a case that ill nature and friction would lose. The art of the greatest counsel is seen in the rareness with which they use asperity, and the efficiency and effectiveness with which they use that and a genial humor in turn. Lawyers have many and peculiar reasons for ill humor, and they have a right to indulge in the worst kind of ill nature that any body has. They have al their own grievances and most of their clients' to bear. There is always another lawyer against them, and just half the time the court also; and when, after all this, the bill is not paid, here is as good a cause for acidity of temper as there can be.

——"My case is just here," said a citizen to a lawyer the other day; "the plaintff will swear that I hit him. I will swear that I did not. Now, what can you lawyers make out of that, if we go to trial?" "Five dollars apiece!" was the prompt reply.